Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-299

NATIONAL GYPSUM COMPANY,
Appellant,

versus

ADMINISTRATOR, LOUISIANA DEPARTMENT OF EMPLOYMENT SECURITY, ET AL,
Appellee.

Appeal from the Supreme Court of Louisiana

JURISDICTIONAL STATEMENT

SAMUEL LANG
WILLIAM C. TIDWELL, III
WALTER W. CHRISTY
Kullman, Lang, Inman
& Bee
A Professional Corporation
Post Office Box 60118
New Orleans, Louisiana 70160

Counsel for Appellant
National Gypsum Company

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 504 822-1611

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NATIONAL GYPSUM COMPANY,
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ADMINISTRATOR, LOUISIANA DEPARTMENT OF EMPLOYMENT SECURITY, ET AL,
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Appeal from the Supreme Court of Louisiana

JURISDICTIONAL STATEMENT

National Gypsum Company (hereinafter referred to as the Employer), the appellant herein, has litigated the eligibility of locked-out employees for unemployment benefits through three levels of administrative agencies and three levels of the judicial system of the State of Louisiana. Louisiana's highest court, the state supreme court, ruled that under state law locked-out employees are eligible for unemployment benefits. The Employer's petition for rehearing was denied, and this appeal followed. This jurisdictional statement shows that the Supreme Court of the United States has jurisdiction of the appeal and the question presented is substantial.

ALTERNATIVE PETITION FOR CERTIORARI

Should this appeal be improvidently taken and the proper mode of review be by petition for certiorari, the Employer requests that these papers be considered as a petition for certiorari as provided by 28 U.S.C. §2103 (1970).

I. OPINIONS BELOW

The decisions of the Louisiana Department of Employment Security, the Appeals Referee, and the Board of Review are unreported. The opinion of the Civil District Court for the Parish of Orleans is unreported. The opinion of the Louisiana Fourth Circuit Court of Appeal is reported at 300 So. 2d 527 (La. App. 4th Cir. 1974), and the opinion of the Supreme Court of Louisiana is reported at 313 So. 2d 230 (La. 1975). Copies of the opinions and decisions are included in the Appendix.

II. JURISDICTION

The Employer brought this action pursuant to La. R.S. 23:1634 in the Civil District Court for the Parish of Orleans seeking judicial review of a decision by the Board of Review of the Louisiana Department of Employment Security. The Employer argued in the state courts that its lockout was protected by federal labor law. On April 24, 1975, the Louisiana Supreme Court ruled that under state law employees locked out in the course of a labor dispute were eligible for unemployment benefits. The Employer petitioned for rehearing alleging, *inter alia*, that the decision conflicted with federal labor policy.

On May 30, 1975, the Louisiana Supreme Court denied the petition for rehearing and implicitly upheld the validity of the state law. Since the decision of the Louisiana Supreme Court was in favor of the validity of the state law, an appeal to the United States Supreme Court is authorized by 28 U.S.C. §1257(2) (1970). The Employer filed its Notice of Appeal on August 19, 1975, in the Civil District Court for the Parish of Orleans, the court possessed of the record.[1]

III. STATE STATUTE INVOLVED

The Louisiana Unemployment Compensation Act provides, in pertinent part:

> An individual shall be disqualified for benefits:
>
> . . . .
>
> (4) For any week with respect to which the administrator finds that his unemployment is due to a labor dispute which is in active progress at the factory, establishment, or other premises at which he is or was last employed; but such disqualification shall not apply if it is shown to the satisfaction of the administrator that he is not participating in or interested in the labor dispute which caused his unemployment. . . .

La. R.S. 23:1601(4).

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1 As a matter of precaution, the Employer also filed a Notice of Appeal in the Louisiana Supreme Court on August 7, 1975.

IV. QUESTION PRESENTED

Under federal labor law an employer may lock out its employees to exert economic pressure in support of its bargaining position. Consistent with that policy, may a state reduce or eliminate the economic pressure exerted by the lockout by paying unemployment benefits to locked-out employees?

V. STATEMENT OF THE CASE

The collective bargaining agreement that gave rise to this dispute expired on February 1, 1973. Prior to that expiration date, the parties engaged in extensive negotiations. Final offers were made and rejected by both sides on January 31, 1973.

At the bargaining session of February 3, 1973, the Employer informed the Union that unless agreement on a new contract was reached by February 5 the employees would be locked out to support the Employer's bargaining position. Another bargaining session was called by the federal mediator for Sunday, February 4, 1973, but that session was unsuccessful in resolving the dispute.

In accordance with the previous notification to the Union, the employees were locked out on February 5, 1973. The locked-out employees filed claims for unemployment compensation, and the Louisiana Department of Employment Security found in their favor.[2] The Employer terminated the lockout on

2 A total of eighty-three claimants are involved in these proceedings. The administrative agencies issued identical decisions for each claimant. All claims were consolidated for hearing in the judicial review proceedings.

March 7, 1973, because of these rulings. Immediately following the cessation of the lockout, the Union called a strike and established a picket line on March 7, 1973.

On appeal, the Appeals Referee reversed the determinations, ruling that the claimants' unemployment resulted from a labor dispute in which they were interested. Thereafter, the Union, on behalf of the claimants, appealed to the Board of Review which reversed the Appeals Referee and held that the claimants were eligible for benefits because they were out of work through no fault of their own.

The Employer filed a petition for judicial review in the Civil District Court for the Parish of Orleans. The decisions of the Board of Review were affirmed, and the Employer appealed to the Louisiana Fourth Circuit Court of Appeal. The court of appeal reversed, holding that the locked-out employees were disqualified because they were interested in a labor dispute in active progress at their place of employment. On appeal by the Union, the Louisiana Supreme Court reversed four to three, holding that the locked-out employees were eligible for unemployment benefits. The Louisiana Supreme Court ruled that the locked-out employees were not interested in a labor dispute "in active progress" within the meaning of the Louisiana statute since they were not "actively engaged" in that dispute by refusing to work.

The Employer filed a petition for rehearing alleging, *inter alia*, that Louisiana law, as interpreted by the Louisiana Supreme Court, interfered with the

Employer's right to free collective bargaining and was invalid under the preemption doctrine. The petition for rehearing was denied on May 30, 1975, and the Employer filed its Notice of Appeal to the United States Supreme Court.

The validity of the Employer's lockout under federal labor law and the *American Ship Building*[3] decision was argued in brief and in oral argument to the Civil District Court for the Parish of Orleans, the Louisiana Fourth Circuit Court of Appeal, and the Louisiana Supreme Court. The dissenting opinion of the Louisiana Supreme Court agreed with the Employer's argument.[4] Following this decision, which for the first time authoritatively construed La. R.S. 23:1601(4), the Employer applied for rehearing on the ground, *inter alia*, that the state law, as interpreted by the state supreme court, was preempted by federal labor policy. The petition for rehearing was denied, without opinion, by the same four to three majority.

VI. THE QUESTION PRESENTED IS SUBSTANTIAL

In *American Ship Building Co. v. N.L.R.B.*, 380 U.S. 300, 318 (1965), the United States Supreme Court held that an employer does not commit an unfair labor practice "when, after a bargaining impasse has been reached, he temporarily shuts down his plant and lays off his employees for the sole purpose of bringing

3 380 U.S. 300 (1965).

4 See quotation from dissenting opinion on p. 9 *infra*.

economic pressure to bear in support of his legitimate bargaining position." The Supreme Court noted that the National Labor Relations Act contemplated resort to economic weapons such as a lockout if more peaceful measures did not avail. *Id.* at 317. The Court also held that Congress, not the Board, makes the major policy decisions concerning the balance of economic power between management and labor, and the Board is not empowered to serve as an arbiter of the economic weapons available to either side. *Id.* at 317-18; *see N.L.R.B. v. Brown*, 380 U.S. 278, 292 (1965); *N.L.R.B. v. Insurance Agents' International Union*, 361 U.S. 477, 497-98 (1960).

Louisiana law, as interpreted by this decision of the Louisiana Supreme Court, interferes with the Employer's federally established right to lock out both by effect and by design. The purpose of a lockout, as recognized by *American Ship Building Co., supra*, is to apply economic pressure on the employees in support of the employer's bargaining position. The economic pressure exerted by the lockout is, of course, the loss of wages by the locked-out employees. Obviously, this economic pressure and the effectiveness of the lockout is substantially reduced, if not eliminated, when the state replaces the missing wages.[5]

Furthermore, elimination or reduction of the employer's use of the lockout is an express objective

5 While various welfare programs provide generally for relief to the needy, unemployment benefits are specifically intended to replace wages formerly earned by the worker. Need is not a consideration.

of the Louisiana Supreme Court decision. That court stated:

> To hold that, by resort to the economic coercion of a lock-out instead of to the bargaining table, an employer might also obtain his employees' disqualification from unemployment benefits to help feed themselves and their families, would be to encourage the resort to measures more agressive than peaceful negotiation. The correct interpretation . . . in the light of the general public policy in favor of peaceful bargaining negotiation, should not permit either party to provoke the award or denial of unemployment benefits in order to enforce the effect of a strike or of a lockout.
>
> . . . .
>
> [O]ur interpretation today prevents the disqualification from being used as a weapon to enforce a lock-out. The State should be neutral in labor disputes, and it should not encourage resort to aggressive measures in derogation of peaceful negotiation at the bargaining tables.

National Gypsum Co. v. Administrator, 313 So. 2d 230, 233-34 (La. 1975).

This state interference with federal labor policy is invalid under the preemption doctrine. The relevant preemption test here is whether an incompatible doctrine of local law must give way to principles of

federal labor law. *Local 20, Teamsters v. Morton*, 377 U.S. 252, 258 (1964). In *Morton*, the Supreme Court held that "[t]he answer to that question ultimately depends upon whether the application of state law in this kind of case would operate to frustrate the purpose of the federal legislation." *Id.* at 258. Or, in the context of this case, does the state policy of paying unemployment benefits to locked-out employees frustrate the Employer's right to lock out its employees to bring economic pressure in support of its bargaining position?

This frustration of the federal policy is evident. Federal law contemplates resort to economic weapons by the parties to collective bargaining. Where the state removes the economic impact of the lockout, the employer's weapon is rendered useless. In fact, the Employer in this case ended its lockout because the locked-out employees were declared eligible for unemployment benefits. As stated in the dissenting opinion of the Louisiana Supreme Court:

> Federal labor law recognizes a lockout as a legitimate measure to support the employer's bargaining position. To subsidize the employees through unemployment compensation during a lockout would undermine the economic measure, which the law itself shelters.

National Gypsum Co. v. Administrator, *supra* at 235 (citations omitted).

Louisiana law thus improperly places the state on the side of one of the parties to collective bargaining. If

the employees exercise their right to strike, the state remains neutral, aiding neither the strikers nor the employer. However, if the employer uses its economic weapon, the state aids the other side to the bargaining dispute. This policy is inconsistent with the federal requirement of state neutrality in labor disputes. *See Garner v. Teamsters Union*, 346 U.S. 485, 500 (1953).[6]

The federal preemption doctrine recognizes that a compelling state interest may in some cases justify state action even where there is an incidental effect on federal labor policy. *Local 20, Teamsters v. Morton, supra* at 257. Here, the Louisiana Supreme Court stated that the state interest being asserted is "to protect the stability of the state and of the family, by relieving the family distress and the menace to the public welfare occasioned through unemployment of individual workers." *National Gypsum Co. v. Administrator, supra* at 232. Thus, the state has sought to relieve the economic hardship that is the sole *purpose* of a legitimate lockout. Since economic hardship is the goal, not merely an incidental effect, of a lockout, relieving that hardship is directly contrary to federal labor policy and cannot constitute a permissible state objective.

The use of the lockout and its effect on the bargaining relationship is an area left by Congress "to be controlled by the free play of economic forces." *N.L.R.B. v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971). The state

6 Since unemployment benefit programs are funded by a payroll tax on the *employer*, the employer is placed in the preposterous position of subsidizing the party with which it has the labor dispute.

policy of subsidizing locked-out employees interferes with this free play of economic forces and upsets the balance of bargaining power established by Congress. As this Court has stated:

> For a state to impinge on the area of labor combat designed to be free is quite as much an obstruction of federal policy as if the state were to declare picketing free for purposes or by methods which the federal Act prohibits.

Garner v. Teamsters Union, supra at 500. And, in *Local 20, Teamsters v. Morton, supra*, the Supreme Court voided a state attempt to award damages against a union for strike action by the union that was permissible under federal labor policy. This Court stated:

> This weapon of self-help, permitted by federal law, formed an integral part of the petitioner's effort to achieve its bargaining goals during negotiations with the respondent. Allowing its use is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community. If the [state] law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted §303, the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy. . . .

Id. at 259-260 (footnote and citation omitted).

As noted above, the frustration of the Employer's use of the lockout was an avowed goal of the Louisiana Supreme Court decision. Regardless of the merits of "peaceful negotiations" versus "aggressive lockouts,"[7] it is clear that the state has no power to infringe in this area. The determination of the balance of economic power is for Congress. *American Ship Building Co. v. N.L.R.B., supra* at 317-18. Neither the Board nor the states may frustrate that policy or interfere with the balance of power struck by Congress. *N.L.R.B. v. Insurance Agents' International Union, supra* at 497-98; *Garner v. Teamsters Union, supra* at 500. State control over the payment of unemployment benefits to locked-out employees would result in a patchwork of inconsistent decisions frustrating the policy of uniformity in national labor policies. *See N.L.R.B. v. Nash-Finch Co., supra* at 144.[8]

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7 See quotations from majority opinion of Louisiana Supreme Court, *supra*, p. 8.

8 The decision of the Louisiana Supreme Court is inconsistent with several federal and state statutes and numerous state court decisions holding that a lockout *is* a labor dispute. *See, e.g.*, 29 U.S.C. §152(9) (1970); Ala. Code tit. 26, §377(b); Ind. Code tit. 22, art. 6, chp. 1, §12; N.J.R.S. §43:21-5(d); Wash. Code. §49.32.010; *Liberty Trucking Co. v. DILHR*, 204 N.W.2d 457 (Wisc. 1973); *Basso v. News Syndicate Co.*, 216 A.2d 597 (N.J. Sup. Ct., App. Div. 1966); *Nelson v. Texas Employment Comm.*, 250 S.W.2d 708 (Tex. Civ. App. 1956); *Adkins v. Indiana Employment Security Division*, 70 N.E.2d 31 (Ind. App. Ct. 1946). National uniformity would be further breached by allowing each state to determine for itself the economic weapons available to an employer through the state's definition of a "labor dispute" so as to include or exclude lockouts.

CONCLUSION

For the foregoing reasons, it is apparent that a substantial federal question is presented concerning the validity of state unemployment payments to locked-out employees. Furthermore, the decision of the Louisiana Supreme Court clearly frustrates federal labor policy.

This Court should note probable jurisdiction and grant plenary consideration through briefing and oral argument on the merits.

Respectfully submitted this 25th day of August, 1975.

SAMUEL LANG

WILLIAM C. TIDWELL, III

WALTER W. CHRISTY
Kullman, Lang, Inman
& Bee
A Professional Corporation
Post Office Box 60118
New Orleans, Louisiana 70160
(504) 524-4162

CERTIFICATE OF SERVICE

I hereby certify that I have this 25th day of August, 1975, by certified mail, return receipt requested, postage prepaid, mailed three copies of the foregoing Jurisdictional Statement to:

1. Administrator
   Louisiana Department of Employment Security
   Through its counsel of record, Marion Weimer
   Attorney at Law
   Louisiana Department of
   Employment Security
   P. O. Box 44094
   Baton Rouge, Louisiana 70804
2. Oil, Chemical & Atomic Workers Local Union No. 447
   Intervenor, Through its counsel of record,
   Leonard A. Washofsky
   Jackson & Hess
   1411 Decatur Street
   New Orleans, Louisiana 70116
3. Louisiana AFL-CIO
   Amicus Curiae in the Supreme Court of Louisiana
   through its counsel of record,
   C. Paul Barker
   Dodd, Barker, Boudreaux, Lamy & Gardner
   1400 Richards Building
   837 Gravier St.
   New Orleans, Louisiana 70112

It is further certified that all parties required to be served have been served.

SAMUEL LANG

APPENDIX A

State of Louisiana
Department of Employment Security
Post Office Box 44094
Baton Rouge, Louisiana 70804
Notice of Claim Determination

Batch No.:320 Date: 2/20/73
Labor Dispute #306

Claimant's Name: Jim Adams
Address: 1563 Owens, New Orleans, La. 70122

Effective Date of Claim: 02-04-73

Social Security Account Number: 439-80-4972

In accordance with the provisions of Section 1601-4 of the Louisiana Employment Security Law, you have not been disqualified from benefits.

Section 1601-4: For any week with respect to which the Administrator finds that his unemployment is due to a labor dispute which is in active progress at the factory, establishment, or other premises at which he is or was last employed; but such disqualifications shall not apply if it is shown to the satisfaction of the Administrator that he is not participating in or interested in the labor dispute which caused his unemployment.

Findings of Fact: Evidence at hand indicates that workers of the National Gypsum Company have reported for every shift, including the February 1,

1973, 7:00 a.m. to 3:00 p.m. shift, and have made themselves uninterruptedly available for work while contract negotiations continued, and have made themselves available for work since the cessation of plant operations. As the United States Supreme Court points out in the case of California Department of Human Resources Development et al. v. Judith Java et al. in relation to the unemployment insurance program, "The objective of Congress was to provide a substitute for wages lost during a period of unemployment not the fault of the employee." The individuals in this case have reported for work in good faith at the beginning of every designated work shift and have found no work available. The case involves the right of individuals to receive benefits under a program which provides unemployment benefits for individuals whose unemployment comes about through no fault of their own. These individuals have not become unemployed as a result of the failure of the two parties to reach an agreement or as a result of any dereliction on the part of the workers. Negotiations were still in progress at the time the plant ceased to operate. The workers are ready and willing to work under the present status of negotiations. The employer is not willing to furnish work. The workers are unemployed due to lack of work at the plant and are entitled to unemployment benefits.

Appeal Rights: If you do not or your employer does not agree with this determination, the area office shown below should be contacted, in person or by mail, by 3/02/73.

Personnel of the area office will assist in preparing an appeal. If the appeal is not received on or before the date mentioned above, appeal rights will be lost. If you appeal, continue to file claims until a final decision is rendered.
Date delivered _____ By _____ Date Mailed 2/20/73 By R.T.

Employer: National Gypsum Company
10 Louisiana Street
Westwego, Louisiana 70094

Area Office Stamp
La. Dept. of Employment Security
735 St. Charles Avenue
New Orleans, Louisiana 70130

APPENDIX B

STATE OF LOUISIANA
APPEALS TRIBUNAL
FOR THE
DEPARTMENT OF EMPLOYMENT SECURITY
735 ST. CHARLES AVENUE
NEW ORLEANS, LOUISIANA

DECISION OF APPEALS REFEREE

IN THE CASE OF:

NATIONAL GYPSUM COMPANY, 10 LOUISIANA STREET, WESTWEGO, LOUISIANA 70094.

versus

JIM ADAMS, 1563, OWENS STREET, NEW ORLEANS, LOUISIANA 70122

DOCKET NUMBER: 1615-AT-73
S. S. NUMBER: 439-80-4972
AREA OFFICE: NEW ORLEANS
BATCH NUMBER: 320
APPEAL FILED: FEBRUARY 27, 1973
APPEAL RECEIVED: MARCH 8, 1973
DECISION MAILED: APRIL 13, 1973

ISSUE

Disqualification for Benefits- R. S. 23:1601(4)

CASE HISTORY

After receiving information from the employing unit, the claimant and union representation, the Agency found the claimant to be unemployed as a result of a "lack of work" and therefore, not unemployed as a result of a labor dispute where last employed.

Upon being notified that claimant was eligible for benefits without disqualification, the employer appealed on a timely basis.

In view of the fact 83 claimants were involved, a decision to consolidate the hearing was made by the Referee. To this end, a pre-hearing conference was held on March 28, 1973, in Gretna, Louisiana. Messrs. M. C. Grisham, Plant Manager, Roy Grob, Industrial Relations, and Julian R. Murray, Attorney, appeared on behalf of the employing unit. On behalf of union employees, Messrs. Ernest J. Rousselle, International Representative, Leonard A. Washofsky, Attorney, Joseph Dugas, and Herman Muse, appeared. Mr. Marion Weimer, Chief Counsel, appeared on behalf of the Administrator, Mr. Earle R. Weaver, Chief Appeals Referee, attended the hearing. Certain stipulations as to facts were made and an agreement made as to persons to appear for, and represent the claimants.

Further, in keeping with agreements, this matter was scheduled for hearing on April 10, 1973, in the Employment Service office, Gretna, Louisiana.

Messrs. M. C. Grisham, Plant Manager, Roy Grob, Industrial Relations, and Julian R. Murray, Attorney, appeared to represent the employing unit. On behalf of the union employees, Messrs. Ernest J. Rousselle, International Representative, Joseph Dugas, Herman Muse, and Willie Ford, appeared as witnesses. Mr. Leonard Washofsky, appeared as Legal Counsel. Mr. Nedas Gauthreaux, President, Oil, Chemical and Atomic Workers International Union, Local No. 4-447, was present for the hearing. Mr. Marion Weimer, Chief Counsel, appeared to represent the Administrator. Mr. Earle R. Weaver, Chief Appeals Referee, was also present.

FINDINGS OF FACT

The claimant is a member of the Oil, Chemical and Atomic Workers International Union, Local No. 4-447. Said Union held collective bargaining rights with the named employer. The then existing contract expired at 7:00 a.m. on February 1, 1973.

In a meeting in January of 1973, by secret ballot, members of the Union gave authority to the negotiating committee to call a strike when, and if they found it necessary during the course of contract negotiations, following the expiration date of the contract, provided authority to strike was given by International authority. A request for such authority was made initially in January, but not actually granted until March 4, 1973.

During the course of contract talks on January 31, 1973, the employer and union presented to each other

proposals that were termed as a "final offer" by each of the parties to the other. Neither party found the other's proposal acceptable.

The Union representative at the end of this session, asked if the plant would operate on February 1, 1973. The employer replied, in effect, that was a management decision and it would be made by management. The Union wanted to furnish a sufficient number of workers to shut down the plant, if management decided to shut it down. Management's reply was that the supervisory force could take care of that, if necessary. The company then asked if the Union intended to strike on February 1, 1973, and the Union replied that management would find out the answer to that question the next day.

The Plant Manager felt that the reply of the Union was a threat of strike and the guard[1] at the gate was told of the anticipated strike and instructed, more or less, to use his discretion to close the gate if there was evidence of a dispute the next morning.

When employees reported for work on February 1, 1973, for the 7:00 a.m. shift, one of them went into the plant at approximately 6:15 a.m. and on the basis of what he heard, he left the plant and went outside the gate where he found shift employees waiting. At about 6:40 a.m., another employee found the gate closed and padlocked. He telephoned the Union's Representative at approximately 7:00 a.m.

---

1 An employee of Pinkerton Detective Agency.

Before the Union Representative appeared at the site, the International Relations Manager arrived (about 7:20) and found the gate locked. He gave instructions for the gate to be opened and the locked gate was opened at approximately 7:30 a.m. Some of the employees were still there near the gate and none attempted to go in when it was unlocked. Work was available. No one from management came out and announced to the Union employees present that work was available and none of the Union employees made an effort to determine if they could go in. No picket line was established.

Before the gate was unlocked, the Union Representative appeared and he called a meeting at the Hall. Most of the men left for the Union Hall prior to the unlocking of the gate. At the meeting, Union Representation urged the men to return to work. The 3:00 p.m. shift of February 1, 1973, reported to work and each shift thereafter was fully manned until the evening shift of February 5, 1973.

Another negotiation meeting was held on February 3, 1973, at which time neither party's proposal was bilaterally acceptable. At this time, the employer declared that if a contract was not agreed on by the 3:00 p.m. shift of February 5, 1973, then the company would not need the services of the employees of the Oil, Chemical and Atomic Workers Union.

Union representation asked if the company was locking them out and management replied "Yes." The company further stated that it was taking this position to protect it's interest, that they had to know where

they stood relative to the availability of manpower and without a contract, they would be at the mercy of the union.

Union representation declared that they would not strike without giving management due, and proper notice.

At 3:00 p.m. on February 5, 1973, the men who were to work that shift, reported for work and found the gate locked. A contract had not been successfully negotiated. The men were told work was not available for the men of Oil, Chemical and Atomic Workers Union because of the "labor dispute."

When the employer learned that the Agency had found the workers eligible for benefits without disqualification, a telegram was sent to each individual employee and to Union representation, notifying them that the employer was willing for them to return to work, effective 7:00 a.m. on March 7, 1973. The employer decided to offer employment because it did not feel it should be required to finance a labor dispute against itself.

The Administrator of the Louisiana Department of Employment Security was notified of the fact the workers were asked to return to work and a determination of the claimant's eligibility for benefits on, and after that date is being processed.

In the period of time between 3:00 p.m. on February 5, 1973, and 7:00 a.m. on March 7, 1973, the plant was kept in operation by supervisory personnel. There was no lack of work.

OPINION

R. S. 23:1601(4) provides that a claimant may be disqualified for any week with respect to which the Administrator finds that his unemployment is due to a labor dispute which is in active progress at the factory, establishment, or other premises at which he is or was last employed; but such disqualification shall not apply if it is shown to the satisfaction of the Administrator that he is not participating in or interested in the labor dispute which caused his unemployment.

The circumstances in this case pose a question of both fact and interpretation of the Law.

The first proposition is: Was there a bonafide labor dispute on February 1, 1973? We think not. First of all, the union employees reported for work and there was no positive evidence of their refusal to go to work on that date. Secondly, management had not given instructions to lock-out the employees on that date. The act of locking the entrance to the plant was the act of a contract guard who exercised independent judgment that trouble was brewing. It is also significant to note that the unlocking of the gate came a full ½ hour after the usual starting hour and no one from mangement made a move to correct the impression that the company had locked out the employees.

The second proposition is: Did claimant become unemployed at 3:00 p.m. on February 5, 1973, because of a labor dispute that became active at that time where he was last employed and did he have an interest in the dispute?

The facts are conclusive that the company "locked out" the union employees. The lock-out occurred because of the fact a labor agreement could not be reached and the employer would not permit the employees, at that time, to work without a contract.

The Louisiana Employment Security Law does not contain a definition of the term "labor dispute." Thus, the usual definition of the term must be considered as the meaning intended by the Legislature. Turning to La. R. S. 23:862(4), we find the Legislature did define the term for guidance for "Mediation and Arbitration of Labor Disputes." The definition therein "includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

In view of the facts in this case, there can be no doubt that the claimant's unemployment came about as a result of a labor dispute. La. R. S. 23:862 (6) defines a "Lock-out" as being the "refusal of the employer to furnish work to employees as a result of a labor dispute."

Unlike the disqualification for having left employment, being discharged from employment and refusal of suitable work, the disqualification for unemployment due to a labor dispute does not involve a question of whether the unemployment is incurred through fault on the part of the individual worker. Instead, it

marks an area that excludes eligibility. This exclusion rests in part on an effort of the State to maintain a neutral position in regard to the labor dispute.

Since the unemployment arose relative to a controversy concerning terms and conditions of his employment, the claimant is interested in the dispute.

IT IS ORDERED that the determination of the Agency be reversed. The claimant is disqualified from February 5, 1973, to March 7, 1973, for having been unemployed as a result of a labor dispute, produced by a lock-out, during said period and in which he had or has an interest.

/s/ HENRY J. CRAYON
HENRY J. CRAYON
APPEALS REFEREE

ya
FURTHER APPEAL RIGHTS: This decision becomes final unless an appeal is filed with the Louisiana Board of Review within ten days after the mailing date as shown on the face of this decision. This appeal can be filed at the Louisiana Department Employment Security Claims Office where claim was filed.

APPENDIX C

STATE OF LOUISIANA
BOARD OF REVIEW
FOR THE
DEPARTMENT OF EMPLOYMENT SECURITY
BATON ROUGE, LOUISIANA

DECISION OF BOARD OF REVIEW

IN THE CASE OF:

Jim Adams
1563 Owens Street
New Orleans, Louisiana 70122

VERSUS

National Gypsum Company
10 Louisiana Street
Westwego, Louisiana 70094

DOCKET NO. 574-BR-73 (1615-AT-73)
S.S. NUMBER: 439-80-4972
BATCH NUMBER: 320
AREA OFFICE: New Orleans
APPEAL FILED: April 17, 1973

ISSUE

Disqualification for Benefits — R.S. 23:1601(4)

HISTORY

This case came before the Louisiana Board of Review upon an appeal timely filed by the claimant, through Mr. Leonard A. Washofsky, Attorney, on April 17, 1973, from a decision of Mr. Henry J. Crayon, Appeals Referee, rendered and mailed April 13, 1973. The Referee, in his decision, ordered that the determination of the Agency be reversed. The claimant is disqualified from February 5, 1973 to March 7, 1973, for having been unemployed as a result of a labor dispute, produced by a lock-out, during said period and in which he had or has an interest.

In view of the fact 83 claimants were involved, a decision to consolidate the hearing was made by the Referee. To this end, a pre-hearing conference was held on March 28, 1973, in Gretna, Louisiana. Messrs. M. C. Grisham, Plant Manager, Roy Grob, Industrial Relations, and Julian R. Murray, Attorney, appeared in behalf of the employing unit. In behalf of union employees, Messrs. Ernest J. Rousselle, International Representative, Leonard A. Washofsky, Attorney, Joseph Dugas, and Herman Muse, appeared. Mr. Marion Weimer, Chief Counsel, appeared in behalf of the Administrator, Mr. Earle R. Weaver, Chief Appeals Referee, attended the hearing. Certain stipulations as to facts were made and an agreement made as to persons to appear for, and represent the claimants.

Further, in keeping with agreements, this matter was scheduled for hearing on April 10, 1973, in Gretna, Louisiana. Messrs. M. C. Grisham, Plant Manager, Roy Grob, Industrial Relations and Julian R. Murray, Attorney, appeared to represent the employing unit.

HISTORY

In behalf of the union employees, Messrs. Ernest J. Rousselle, International Representative, Joseph Dugas, Herman Muse, and Willie Ford, appeared as witnesses. Mr. Leonard Washofsky, appeared as Legal Counsel. Mr. Nedas Gauthreaux, President of Oil, Chemical and Atomic Workers International Union, Local No. 4-447, was present for the hearing. Mr. Marion Weimer, Chief Counsel, appeared to represent the Administrator. Mr. Earle R. Weaver, Chief Appeals Referee, was also present.

EVIDENCE

The claimant is a member of the Oil, Chemical and Atomic Workers International Union, Local No. 4-447. On February 1, 1973, the existing contract expired at 7:00 A.M. The claimant continued to work until February 5, 1973. When the men who were to work the 3:00 P.M. shift on February 5, 1973, reported for work, they found the gate locked and work not available for union members. The claimant continued to report for work each day but was unable to enter the Plant because the gate was locked and no work was available. The union representative and each individual employee received a telegram stating, in substance, that the employer was willing for them to return to work, effective March 7, 1973 at 7:00 A.M. Management's reason for sending this telegram and making this offer was that they did not feel that they could afford to finance their own lock-out.

OPINION

R. S. 23:1601(4) provides that a claimant may be disqualified for any week with respect to which the Ad-

ministrator finds that his unemployment is due to a labor dispute which is in active progress at the factory, establishment, or other premises at which he is or was last employed; but such disqualification shall not apply if it is shown to the satisfaction of the Administrator that he is not participating in or interested in the labor dispute which caused his unemployment.

The Board of Review has carefully read all of the information presented before and at the hearing, and we fail to find where the claimant was active in a strike. The claimant was advised by his supervisor that work was not available for members of the Oil, Chemical and Atomic Workers International Union. We find that the employees reported to work each day, was [sic] locked out and no work was available.

The Unemployment Compensation Act is not intended to encourage idleness or labor disputes nor to force an employer to contribute benefits to help finance his employees' disputes with him. Only an employee prevented from working through no act of his own should be entitled to unemployment benefits.

It is, therefore, concluded by the Board of Review that the claimant was separated from employment under nondisqualifying circumstances, through no fault of his own.

IT IS ORDERED that the decision of the Appeals Referee be reversed, and the determination of the

Agency reinstated, qualifying the claimant for benefits from February 5, 1973 to March 7, 1973.

LOUISIANA BOARD OF REVIEW
/s/ MRS. JEWELL LONG
MRS. JEWELL LONG, CHAIRMAN
/s/ IVAN W. FISK, JR.
IVAN W. FISK, JR., VICE CHAIRMAN
/s/ THEO. B. TALLEY
THEO. B. TALLEY, SECRETARY

DECISION MAILED: 6-29-73

dmg

FURTHER APPEAL RIGHTS:

This decision becomes final unless an appeal is filed in the district court in the parish where the claimant resides, or last resided, within ten (10) days after the mailing date of this decision.

APPENDIX D

CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

NATIONAL GYPSUM COMPANY

versus No. 558-174

ADMINISTRATOR, LOUISIANA DEPARTMENT OF EMPLOYMENT SECURITY, et al

Reasons for judgment rendered by the Honorable Thomas A. Early, Jr., Judge Presiding, Division "A", on Friday, January 11, 1974, New Orleans, Louisiana.

APPEARANCES:

MESSRS. KULLMAN, LANG, INMAN & BEE (BY: WILLIAM C. TIDWELL, III, ESQUIRE) (Attorneys for NATIONAL GYPSUM COMPANY)

MARION WEIMER, ESQUIRE (Attorney for ADMINISTRATOR, LOUISIANA DEPARTMENT OF EMPLOYMENT SECURITY)

LEONARD A. WASHOFSKY, ESQUIRE (Attorney for OIL, CHEMICAL AND ATOMIC WORKERS LOCAL UNION NO. 4-447, INTERVENOR)

REPORTED BY:
BEN C. FULKERSON, C.S.R.
OFFICIAL COURT REPORTER

THE COURT [orally]:

Before me this date is the case of National Gypsum Company versus Administrator of Louisiana Department of Employment Security and the named complaintant involved herein.

This is a suit by the employer involving thirty some odd workers of the union, namely the Oil, Chemical and Atomic Workers Local Union No. 4-447.

The record in this case will show that the original Hearing Officer denied that the claimant should be allowed unemployment compensation.

The next stage was the Appeals Referee who overruled the original Hearing Officer's ruling and said the complaintants were not allowed to unemployment compensation, and the final administrative appellate review within the Louisiana Department of Employment Security, the Board of Review it is called, reversed the Appellate Referee and reinstated the original Hearing Officer's decision that the employees involved were allowed to receive the unemployment compensation.

This is a matter that smacks of res nova in this field of unemployment compensation.

The record will reflect that the union and the National Gypsum Company contract was expiring and negotiations were had; they broke down and a new contract was not struck. The employer exercised his right to invoke what is known as a lockout, which of course prevented the employees from going back to work.

After the lockout, the employees struck. Following the strike ultimately a new contract was signed.

The question before me is when the employer invoked the lockout and the employees were not able to go back to work, does this lockout constitute a labor dispute or rather unemployment is due to a labor dispute as per revised statute 23:1601, paragraph four.

Thus, the Court has 23:1601, paragraph four before it, and also the judicial review article, revised statute 23:1634.

1634 says that upon the filing of a petition for review by the administrator or upon the service of the petition on him, the administrator shall forthwith send by registered mail to each other party to the proceeding a copy of the petition, and such mailing shall be deemed to be completed service upon all parties. In any proceeding under this section the findings of the Board of Review as to the facts, if supported by sufficient evidence and in the absence of fraud, shall be conclusive.

Thus, the facts as stated in the opinion of the Board of Review as stated in its history, in its decision, is to be taken as conclusive.

The jurisdiction of this Court shall be confined to questions of law.

This Court's understanding of its duties in a case of such is that it should only reverse or remand for further hearings if it feels that the Board of Review, as the arm of Louisiana Department of Employment Security, is in error in their conclusions of the law, guiding their decision.

Unfortunately there is not much jurisprudence in this area of the law.

This Court also is of the opinion that administra-

tive rulings or department rulings should only be reversed if their rulings are obviously contra to the law: that is, that their decision is so patently wrong that it screams out in its errors alone.

The Court is of the opinion that the Board of Review did not make a decision contra to the law.

The Board in its opinion which is stated and there is no need to repeat; the Court is of the opinion that its opinion is correct.

Counsel for the company have supplied a very abled brief and extremely abled arguments whereby he says that a labor dispute should be interpreted under R.S. 23:1604 as also including a lockout, because he states in 23:1603 subparagraph "B" that the legislature used the word strike, lockout or other labor dispute.

Therefore, this is abled counsel's arguments for the employer.

Remember that I respectfully state that he does not just pull out of the air this. It has very good grounds of analogizing that to lockout, because in the paragraph before that is not before me, they used the term strike, lockout or other labor dispute.

He very ably disputed that 1604 should include the term lockout.

This Court respectfully disagrees with counsel insomuch as the Court is of the opinion that if this legislature intended labor dispute to also include lockout, then it would have so said.

This Court strongly is of the opinion that it should not legislate what it feels the legislature wanted or intended and in the absence of the legislature making it clear what was its intention, this Court is of the opinion that it should interpret the law strictly to the wordage included by the legislature.

Again, and I guess the appellate tribunals are get-

ting tired of me singing like a canary, whereby this Court having been in the legislature is most careful that it not legislate from the bench as too many of my colleagues do daily, both in State and Federal level.

More decisions are rendered by Courts which is legislation and not judicial review and interpretation, which this Court thinks is an error.

Therefore, the Court is of the opinion that if the legislature meant lockout, it would have put lockout in paragraph four and in the absence of doing it, this Court is of the opinion without going into philosophies, this Court is of the opinion that the employer by preventing the employee to come to work on his lockout, which he has allowed the National Labor Relations Law is analogous to firing an employee without reason, and the Court so states. That is the general philosophy of unemployment compensation, that the employee is laid off; he wasn't at fault for the laying off; he didn't goof off; he was on time, but the action was arbitrary towards the employer, the employee is allowed to collect unemployment compensation, in the case the employee presented himself for work, but the company for their own economic desire, which it does not dispute and perhaps would have done the same had it been it, but in the old expression, the employer cannot have his cake and eat it too, i.e. if he wanted to exercise his economic right of lockout and labor dispute, then he cannot avoid his falling into the other economic trap that he is forced to pay unemployment compensation, because the employee was not allowed to work with no fault of his own.

For these reasons, the Court is of the opinion that the Board of Review's opinion in this matter should be maintained and sustained and therefore the suit by the

National Gypsum Company is hereby dismissed at its cost and the motion for summary judgment sought by the employees is hereby granted.

REPORTER'S CERTIFICATE

I, BEN C. FULKERSON, OFFICIAL COURT REPORTER in and for the Parish of Orleans, State of Louisiana, do hereby certify that the foregoing reasons for judgment were taken by me on the afore mentioned date, and said reasons for judgment are true and correct to the best of my knowledge and ability.

/s/ BEN C. FULKERSON
BEN C. FULKERSON, C.S.R.
OFFICIAL COURT
REPORTER

APPENDIX E

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

No. 558-174 DIVISION "A" DOCKET 5

NATIONAL GYPSUM COMPANY

vs.

ADMINISTRATOR, LOUISIANA DEPARTMENT OF EMPLOYMENT SECURITY, ET AL

JUDGMENT

This cause came on for hearing on a motion for summary judgment filed by the plaintiff, National Gypsum Company and a counter motion for summary judgment filed by Oil, Chemical and Atomic Workers Local Union #4-447, Intervenor herein, which motions were heard on January 11, 1974.

PRESENT: William C. Tidwell, III
of Kullman, Lang, Inman & Bee
attorneys for plaintiff,
National Gypsum Company

Marion Weimer, Chief Counsel
for Administrator, Louisiana
Department of Employment Security,
defendant

Leonard A. Washofsky
of Jackson & Hess
Attorneys for Oil, Chemical & Atomic
Workers Local Union #4-447, Intervenor

When, after hearing the pleadings, evidence and argument of counsel, The Court considering the law and the evidence to be in favor thereof for the reasons orally assigned and dictated into the record on January 11, 1974:

IT IS ORDERED, ADJUDGED AND DECREED that the motion for summary judgment filed by plaintiff

National Gypsum Company be and the same is hereby denied.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the motion for summary judgment filed by intervenor be and the same is hereby granted and accordingly:

IT IS ORDERED, ADJUDGED AND DECREED that this petition for judicial review be and the same is hereby dismissed at plaintiff's costs, and the decision of the Board of Review of the Louisiana Department of Employment Security is approved and affirmed.

JUDGMENT read, rendered and signed in open Court on this 11th day of January, 1974.

/s/ THOMAS A. EARLY, JR.

JUDGE

APPENDIX F

COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

NATIONAL GYPSUM COMPANY

versus No. 6397

ADMINISTRATOR, LOUISIANA DEPARTMENT OF EMPLOYMENT SECURITY, ET AL

APPEAL FROM THE CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS, NO. 558-174, HONORABLE THOMAS A. EARLY, JR., JUDGE.

JOHN C. BOUTALL
JUDGE

(Court composed of Judges James C. Gulotta, John C. Boutall and Patrick M. Schott.)
GULOTTA, J. DISSENTING WITH WRITTEN REASONS.

LEONARD A. WASHOFSKY, JACKSON & HESS, COUNSEL FOR OIL, CHEMICAL & ATOMIC WORKERS LOCAL UNION #4-447,
INTERVENOR-APPELLEE.

MARION WEIMER, JAMES A. PIPER AND JAMES A. MCGRAW, P.O. BOX 44094, BATON ROUGE, LA. 70804, COUNSEL FOR F.C. DOYAL, JR., ADMINISTRATOR OF THE DEPARTMENT OF EMPLOYMENT SECURITY, STATE OF LOUISIANA,
DEFENDANT-APPELLEE.

MICHAEL J. MOLONY, JR. of JONES, WALKER, WAECHTER, POITEVENT, CARRERE & DENEGRE, COUNSEL FOR CHEVRON CHEMICAL COMPANY, INC. *AS AMICUS CURIAE.*

SAMUEL LANG;
WILLIAM C. TIDWELL, III, KULLMAN, LANG, INMAN & BEE; COUNSEL FOR NATIONAL GYPSUM COMPANY,
APPELLANT.

REVERSED AND RENDERED

This is a suit involving the right of a number of employees to receive unemployment compensation benefits. Their initial claim was resisted on the ground of disqualification under R.S. 23:1601 (4).[1] The Board of Review concluded that the claimants were separated from employment under nondisqualifying

1 "R.S. 23:1601 Disqualification for benefits.
* * * * *
(4) For any week with respect to which the administrator finds that his unemployment is due to a labor dispute which is in active progress at the factory, establishment, or other premises at which he is or was last employed; but such disqualification shall not apply if it is shown to the satisfaction of the administrator that he is not participating in or interested in the labor dispute which caused his unemployment. * * * * *"

circumstances, through no fault of their own, and granted benefits. Judicial review was sought and in a summary judgment the trial court agreed with the Board of Review. From this adverse judgment, the employer has appealed.

At the outset it is well to note that the basic issues in this case are complicated by the procedural method by which this appeal reaches us. The employer properly filed a petition for judicial review from the decision of the Board of Review for the Department of Employment Security pursuant to R.S. 23:1634 making the Administrator of the Department of Employment Security and the named employees defendants. The Administrator answered. Local Union #4-447 of the International Union of Oil, Chemical and Atomic Workers, A.F.L.-CIO, which represents the named employees, they being members, filed a petition for intervention on behalf of the employee claimants. The employer then filed a motion for summary judgment alleging that the pleadings and the administrative record on file show that there is no genuine issue as to material fact, and that the employer is entitled to judgment as a matter of law. In turn, the Union filed a motion for summary judgment also alleging that from the pleadings and the entire quasi judicial record, there is no genuine issue of material fact in this case, and that as a matter of law, there should be judgment in favor of the Administrator and the named defendants affirming the decision of the Board of Review and dismissing plaintiff's suit. These two motions for summary judgment came for trial at the same time, and the court rendered judgment dismissing the motion for summary judgment filed by the employer but maintaining the

motion for summary judgment sought by the intervenor, dismissing plaintiff's suit. The plaintiff employer has appealed that judgment to us, asking that the judgment be reversed and the claimants be disqualified from receiving benefits.

The problem that faces us is as follows. We disagree with the summary judgment rendered, both procedurally and on the law governing the merits of the claim, for reasons to be discussed hereinafter. Although we would thus reverse the summary judgment rendered, we may not reverse appellant's motion for summary judgment which was denied and render it in favor of appellant. There are two reasons for this. The same procedural infirmity applicable to appellee's summary judgment is equally applicable to appellants. C.C.P. Art. 968 provides that no appeal lies from a refusal to grant summary judgment. With these principles in mind, we proceed to discuss both the procedural aspect of the case and the merits of the claim.

At the outset, we point out that neither counsel has argued to us, in brief or in oral argument, the question of the propriety of a summary judgment in this case, but have concerned themselves only with arguing before us those issues which come under the scope of judicial review as set out in R.S. 23:1634. From the briefs filed in the record in support of the various motions for summary judgment, as well as the reasons for judgment given by the trial judge, it appears that the motion for summary judgment was simply considered as the equivalent of the judicial review permitted under the statute. We quote the appropriate

portions of the law relating to these two procedural methods:

"LSA-R.S. 23:1634 Judicial review; procedure

* * * *

"In any preceeding under this Section the findings of the board of review as to the facts, if supported by sufficient evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law. No additional evidence shall be received by the court, but the court may order additional evidence to be taken before the board of * * * hearing such additional evidence, modify its findings of fact or conclusions, and file such additional or modified findings and conclusions, together with a transcript of the additional record, with the court. Such proceedings shall be heard in a summary manner and shall be given precedence over all other civil cases except cases arising under the workmen's compensation law of this state. * * * * *"

"LSA-C.C.P. Article 966 Motion for summary judgment; procedure

* * * * *

"* * * * * The judgment sought shall be rendered forthwith if the pleadings, depositions,

answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law. As amended Acts 1966, No. 36 §1."

The reading of these two sections of the law clearly reveals that the judicial review requires an examination into and evaluation of the evidence as it relates to the findings of fact by the Board of Review. On the other hand, the summary judgment procedure must be on uncontradicted fact or it may not be used as a procedural device. Yet in the case at bar both parties insist that there is no issue of fact, but submit for our consideration the entire administrative record.

That record discloses that the initial claim determination made by the claims agent, based upon the evidence before him, was that the workers were unemployed due to lack of work at the plant and are entitled to unemployment benefits. The employer then appealed to the appeals referee, who held a pre-trial conference at which stipulations were entered into, and then a hearing in which a number of witnesses appeared and testified. Based upon the evidence before him, the appeals referee was of the opinion that the circumstances posed both a question of fact and interpretation of law. He found that the facts were conclusive that the company "locked out" the Union employees because a labor agreement could not be reached between them and the employer would not permit the employees to work without a contract. He found that there was a labor dispute within the

provisions of R.S. 23:1601 (4) disqualifying the claimants because they were interested in the dispute.

The employees then appealed to the Board of Review and that Board reversed the finding of the appeals referee on the following basis:

"EVIDENCE

"The claimant is a member of the Oil, Chemical and Atomic Workers International Union, Local No. 4-447. On February 1, 1973, the existing contract expired at 7:00 A.M. The claimant continued to work until February 5, 1973. When the men who were to work the 3:00 P.M. shift on February 5, 1973, reported for work, they found the gate locked and work not available for union members. The claimant continued to report for work each day but was unable to enter the Plant because the gate was locked and no work was available. The union representative and each individual employee received a telegram stating, in substance, that the employer was willing for them to return to work, effective March 7, 1973 at 7:00 A.M. Management's reason for sending this telegram and making this offer was that they did not feel that they could afford to finance their own lock-out.

"OPINION

"R.S. 23:1601 (4) provides that a claimant may be disqualified for any week with respect

to which the Administrator finds that his unemployment is due to a labor dispute which is in active progress at the factory, establishment, or other premises at which he is or was last employed; but such disqualification shall not apply if it is shown to the satisfaction of the Administrator that he is not participating in or interested in the labor dispute which caused his unemployment.

"The Board of Review has carefully read all of the information presented before and at the hearing, and we fail to find where the claimant was active in a strike. The claimant was advised by his supervisor that work was not available for members of the Oil, Chemical and Atomic Workers International Union. We find that the employees reported to work each day, was locked out and no work was available.

"The Unemployment Compensation Act is not intended to encourage idleness or labor disputes nor to force an employer to contribute benefits to help finance his employees' disputes with him. Only an employee prevented from working through no act of his own should be entitled to unemployment benefits.

"It is, therefore concluded by the Board of Review that the claimant was separated from employment under non-disqualifying circumstances, through no fault of his own."

The employer then filed a petition for judicial review in the district court but the matter procedurally came for trial on the adverse motions for summary judgment. The district judge, although ruling on these motions, used his formula for judicial review in arriving at his decision, as witness his reasons for judgment:

> "Thus, the Court has 23:1601, paragraph four before it, and also the judicial review article, revised statute 23:1634.
>
> "1634 says that upon the filing of a petition for review by the administrator or upon the service of the petition on him, the administrator shall forthwith send by registered mail to each other party to the proceeding a copy of the petition, and such mailing shall be deemed to be completed service upon all parties. In any proceeding under this section the findings of the Board of Review as to the facts, if supported by sufficient evidence and in the absence of fraud, shall be conclusive.
>
> "Thus, the facts as stated in the opinion of the Board of Review as stated in its history, in its decision, is to be taken as conclusive.
>
> "The jurisdiction of this Court shall be confined to questions of law.
>
> "This Court's understanding of its duties in a case of such is that it should only reverse or

> remand for further hearings if it feels that the Board of Review, as the arm of Louisiana Department of Employment Security, is in error in their conclusions of the law, guiding their decision."

As we see the problem which thus arises, the parties to the motions for summary judgment each rely on the entire administrative record, yet the trial judge accepted only the findings of the Board of Review which he considered to be conclusive. From the outline of the administrative proceedings noted above, it appears that a resolution of the issues presented therein on summary judgment required the court to consider and evaluate all of the evidence presented in the case as well as the findings of fact upon which each of the three administrative decisions were based. However, this is beyond the scope of inquiry under the motion for summary judgment.

In numerous decisions our courts have held that summary judgment should not be used as a substitute for trial. Similarly, summary judgment procedure should be used only in those cases which clearly fall within the provisions of the Code of Civil Procedure which relate to summary judgment. See Bodcaw Co. v. Enterkin, La.App. 1973, 273 So.2d 325; Glass v. Vista Shores Club, La.App. 1969, 221 So.2d 304; Lake Charles Harbor and Terminal Dist. v. Farquhar, La.App. 1967, 196 So.2d 847; Haspel v. Treece, La.App. 1963, 150 So.2d 120. We particularly note the case of Cheramie v. Louisiana Power & Light Co., La.App. 1965, 176 So.2d 209, wherein the motion for summary judgment was referred to a trial on the merits and we held that if the mo-

tion is to be utilized it must be heard and decided before trial on the merits; to use it while a jury trial is proceeding is, in effect, using it as a directed verdict. Similarly in the present case, to consider summary judgment upon the entire administrative record is to use it as an alternate decision to the decision on the merits provided by the procedure of judicial review. We see no particular benefit for such a use inasmuch as the judicial review procedure is not only summary in nature but requires preferential hearing.

Turning our attention now away from the purely procedure issue to the factual issue, we consider that the law applicable to the factual issues presented is LSA-R.S. 23:1601 (4), quoted above. This section provides that a claimant is disqualified for benefits when his unemployment is due to a labor dispute in active progress but a claimant is not disqualified if he shows he is not participating in or interested in the labor dispute.

We refer to the cases of Senegal v. Lake Charles Stevedores, Inc., 250 La. 623, 197 So.2d 648 (1967); Hanndyman Homes, Inc. v. Administrator, Dept. of Emp. Security, 192 So.2d 827 (La.App. 1966) and Brown v. Brown, 158 So.2d 305 (La.App. 1963). The import of these cases is that, once the labor dispute was established, the employee is required to affirmatively prove that he came within the exceptions to disqualification.

Under the rationale of these cases we are confronted with an inquiry into the question of whether the claimants have borne the burden of proof required. This

brings us face to face with the difference between the procedural devices discussed above, because here we are required to resolve several factual issues. For example, we note the factual determination made in the case of Singleton v. Brown, 153 So.2d 902 (La.App. 1963) wherein the employees, at the expiration of the contract between their union and their employer, went on a five day wildcat strike. Upon their attempt to return to work they were locked out by the company. The court denied unemployment benefits. We note in the present case that the contract ended on February 1, 1973, and on that date the gates to the plant were closed for a while and one shift did not work that day. There is a factual issue raised as to whether there was a lockout or a strike on February 1, 1973, prior to the lockout of February 5, 1973.

There is another issue raised as to whether the lockout of February 5, 1973 was because of the possibility of a strike, because of the company desire to bring pressure on its employees to accept its contract terms, because the company did not wish to become involved with negotiations with the national union which may include other factories, or because simply of lack of work in general. This issue can only be determined by evaluation of the evidence. In Chrisholm v. Stevens, 231 So.2d 640 (La.App. 1970) it was stated that any doubts as to existence of a material factual issue are to be resolved against granting of summary judgment and in favor of trial on the merits. Where the facts support different conclusions which are not resolved, summary judgment is not the proper disposition of the action. It is not appropriate as a vehicle for disposition of cases requiring judicial

determination of subjective facts such as motive, intent, malice, good faith or knowledge. Fontenot v. Aetna Insurance Company, 225 So.2d 648 (La.App. 1969).

For the reasons above mentioned, we conclude the use of summary judgment under the conditions above expressed is improper. Without considering the merits of the claim, we ordinarily would simply set the judgment aside and remand this matter for further proceedings in the district court.

However, the entire administrative record has already been placed before that court and that court has accepted the findings of the Board of Review. The matter has been argued in the district court as well as here on the scope of judicial review and the merits of the claim. Under these circumstances a remand would serve no purpose except to delay final determination of the issues between the parties. Such delay should be avoided in cases wherein the legislature provides for a preferential resolution of the issues. C.C.P. Art. 2164 provides that the appellate courts shall render any judgment which is just, legal and proper upon the record on appeal. Since both parties have submitted the same factual record, we have only to apply the law pertinent to judicial review and applicable to the merits of the claim. See, for example, Songe v. Tennessee Life Insurance Company, 260 So.2d 149 (La.App. 4th Cir. 1972).

Proceeding thus to the merits, we take note of the findings of the Board of Review and the trial judge as quoted above. We have no quarrel with the findings of fact that are set out. They are substantiated by the rec-

ord. However, we do find that the statement of facts is incomplete in that certain facts which are necessary elements to a determination of the claim under the statute are not mentioned or commented upon. This situation apparently arises because of the erroneous conclusion that the statute required "fault" of the claimant for disqualification for benefits.

The first element to be considered under R.S. 23:1601 (4) is whether there was a labor dispute in active progress at the factory. The Board of Review found only that the claimant was a member of the union; that the contract had expired; that the claimant was locked out, no work was available for union members, and the claimant was not active in a strike. We agree with these findings, but the statutory requirement is that there be an active labor dispute in progress, not simply a strike or lockout.

For a definition of labor dispute, we refer to the legislative definition set out in the general provisions of Chapter 8, Title 23, Revised Statutes dealing with labor organizations and labor disputes, and which we feel to be controlling here:

"R.S. 23:821 Definitions

* * * * *

"(3) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to

arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

The record shows that the claimant is a member of the local union which had entered into a contract with the employer. The contract was due to expire at 7:00 A.M. on February 1, 1973. For more than a month prior to that date, the union and the employer had held collective bargaining meetings for the purpose of negotiating a new contract. At a union meeting in January, 1973, the union members voted to give authority to their negotiating committee to call a strike if negotiations failed and no contract agreement was reached, if it considered a strike necessary after the expiration date of the old contract, and provided the International Union granted authority. Although the request for authority was made in January, it was not granted until March 4, 1973, after a second request on that date.

The day before the expiration of the contract, January 31, 1973, the union and the employer held another bargaining session at which each made a final offer and each in turn was rejected. The next day, February 1, 1973, the union workers reported for work on the morning shift which started at 7:00 A.M., co-incident with the expiration of the contract, but found the gate locked. This was because management had instructed the security guard at the gate to close the gate if it

appeared some trouble may develop. None did, and after consultation between the union and employer representatives, it was agreed that the plant would reopen for the next shift and another bargaining session would be held.

This session was held on February 3, 1973, and no agreement was reached. At this meeting the employer declared that if a contract was not agreed upon by the 3:00 P.M. shift of February 5, 1973, the company would lock the gates and refuse to let the union employees work until there was a contract agreement. The union announced that it would not agree not to strike, but assured the company that it was a responsible union and would give ample notice of a strike, providing the workers necessary to properly close down the plant operations. No agreement was reached by the deadline given, and the company closed the plant to union employees in accordance with its threat, keeping the plant in limited operation by its supervisory personnel.

These facts convince us that there was a controversy concerning terms and conditions of employment between the union and the employer and that it was in active progress at the place of employment. The failure of the parties to settle their dispute and sign a new contract (without regard to who is right or wrong) is the cause of the company locking its doors and preventing the workers from continuing to work. We conclude that this meets the test of disqualification required by the statute.

We now consider the element of participation or interest in the labor dispute.

The Board of Review in its opinion stated that only an employee prevented from working through no act of his own should be entitled to unemployment benefits. It found that the claimant was not active in a strike and hence was separated from employment by virtue of a lockout and through no fault of his own. We are aware of the fact that the Unemployment Compensation Act is not intended to encourage idleness, but is intended to relieve a very real economic menace of workers who wish to be gainfully employed, but are unable to keep or obtain employment. In view of the policy adopted by the legislature to provide relief from such economic duress, we believe the statute should be liberally construed in favor of the employee. However, in this instance, in cases coming under R.S. 23:1601 (4), we are confronted with an equally important policy of this state, that is, that the state should maintain a fair and neutral position in regard to labor disputes. In the interpretation of this section of the statute, the jurisprudence has held, and the statute appears to require, that once it is established that the labor dispute was the cause of unemployment, the employee is required to affirmatively prove that he comes within the exceptions to disqualification. The board found only that there was no fault on the employee and that the employee continued to report for work each day but was prevented from working by the lockout of the employer. As we view the statute, it is not necessary that fault be assessed on either party. We readily perceive the application of fault to disqualifications for benefits under section 1601, subsections (1), (2) and (3). In each of those situations there is a requirement of good cause or finding of misconduct, all of which to some degree embody the question of

fault. But subsection 4 does not so provide. It merely says that the disqualification shall not apply if the employee is not participating in or interested in the labor dispute which caused his unemployment. For the purpose of argument, if we assume that the finding of the board that there was no fault on the employee and that he was unemployed through no act of his own is the equivalent of finding no participation, we are still left with the question of whether the employee was interested in the dispute.

In the case of Senegal v. Lake Charles Stevedores, supra, it was held that there is a distinction between participation and an interest in a labor dispute, and so a non-union worker who did not engage in a strike with the union workers, but whose wages and working conditions were affected, was determined to be disqualified because he was interested in the labor dispute. Similarly, benefits were denied a member of a non-striking union whose unemployment resulted from a strike of other unions in the case of Hanndyman Homes, Inc. v. Administrator, supra.

Again we refer to the general provisions relative to labor organizations and labor disputes, and especially R.S. 23:821 (2), which states as follows:

> "(2) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him and if he is engaged in the industry, trade, craft, or occupation in which such dispute occurs, or is a member, officer, or agent of any association of employers or employees engaged in such industry, trade, craft, or occupation."

In this case, we find as did the board, that the employee was not on strike, that he applied for work every day, but work was denied him because he was locked out by the employer. However, it is admitted that he was a member of the union, and that union on his behalf, was engaged in active negotiations for his terms and conditions of employment. Although there is a difference in the factual conditions extant in the case of Singleton v. Brown, supra, and the facts of this case, in that we find there was no preliminary strike herein, we note that the basic reason for unemployment was that the employees were locked out by the company.

For the foregoing reasons, we conclude that the claimants are disqualified from unemployment benefits and the decision of the Board of Review is incorrect in its application of the law. Accordingly, it is ordered that the judgment appealed from is set aside and reversed, and there is now judgment herein in favor of National Gypsum Company against the defendants, decreeing the claimants ineligible for unemployment compensation benefits for the period involved.

REVERSED AND RENDERED.

NATIONAL GYPSUM COMPANY

versus No. 6397

ADMINISTRATOR, LOUISIANA DEPARTMENT OF EMPLOYMENT SECURITY, ET ALS

GULOTTA, J., DISSENTING

I respectfully dissent. While the trial judge stated he maintained the Motion for Summary Judgment, he appeared to have reached his decision based on the merits of the case.

I concur with the majority that the effect of a remand is to only prolong the litigation. Remanding this matter to the trial court under the circumstances, I believe, will result only in the trial judge rewording his judgment and another appeal taken to this court in which the parties will reiterate the arguments advanced in this appeal. I am of the opinion that we can properly consider the merits of the matter in this appeal before us at this time under the authority vested in the courts of appeal as enunciated in LSA-C.C.P. art. 2164.[1]

However, I disagree with the result reached by the majority. Separating the important from the unimportant, the question before us is whether a "lockout" is a

---

1 LSA-C.C.P. art. 2164 reads as follows:
"The appellate court shall render any judgment which is just, legal, and proper upon the record on appeal. The court may award damages for frivolous appeal; and may tax the costs of the lower or appellate court, or any part thereof, against any party to the suit, as in its judgment may be considered equitable."

"labor dispute" as contemplated and defined under LSA-R.S. 23:821(3) in which the employee is participating or in which he has an interest which would deprive him of unemployment benefits under LSA-R.S. 23:1601(4). I think not.

Labor dispute is defined under LSA-R.S. 23:821(3) as follows:

> "(3) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, or concerning employment relations, or any other controversy arising out of the respective interests of employer and employee, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

A person participating or interested in a labor dispute also is defined in LSA-R.S. 23:821(2).

> "(2) A person or association shall be held to be a person participating or interested in a labor dispute if relief is sought against him and if he is engaged in the industry, trade, craft, or occupation in which such dispute occurs, or is a member, officer, or agent of any association of employers or employees engaged in such industry, trade, craft, or occupation."

The words "lockout" and "strike" are not included in the definition of a labor dispute and properly so. A lockout or strike results from a dispute. LSA-R.S. 23:1601(4) disqualifies an employee from benefits if his unemployment is *due* to a labor dispute in which he is participating or is interested. This Section relates to those actions of the employee which disqualifies him. LSA-R.S. 23:1601(1), (2), and (3) sets forth that an employee may be disqualified if the administrator finds the employee has left his employment without cause; or has been guilty of misconduct; or has failed to apply for available, suitable work. Considered in this connection, Section (4) of LSA-R.S. 23:1601 can only refer to the *voluntary* actions of an employee which caused his unemployment, i.e., a strike. In the instant case, the lockout by the employer caused the unemployment of the employee. Every labor dispute in which an employee is participating or is interested should not disqualify one from benefits unless the unemployment is voluntarily caused by the employee.

I am of the opinion the Board of Review properly approached the question and reached a proper result. While the Board of Review did not so state, the effect of their opinion is that an employee is not disqualified from receiving unemployment benefits when the unemployment results from a "lockout." The significant part of that opinion reads as follows:

> "The Board of Review has carefully read all of the information presented before and at the hearing, and we fail to find where the claimant was active in a strike. The claimant was

advised by his supervisor that work was not available for members of the Oil, Chemical and Atomic Workers International Union. We find that the employees reported to work each day, was locked out and no work was available.

"The Unemployment Compensation Act is not intended to encourage idleness or labor disputes nor to force an employer to contribute benefits to help finance his employees' disputes with him. Only an employee prevented from working through no act of his own should be entitled to unemployment benefits.

> "It is, therefore, concluded by the Board of Review that the claimant was separated from employment under nondisqualifying circumstances, through no fault of his own."

The trial judge agreed and I concur with the result. I am of the opinion, therefore, that in the instant case the employee cannot be disqualified from receiving unemployment benefits under this Section. A different result is contrary to the public policy of this state as enunciated in LSA-R.S. 23:1471.

> "This Chapter may be cited as the 'Louisiana Employment Security Law'.
>
> "As a guide to the interpretation and application of this Chapter, the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious

> menace to the health, morals and welfare of the people of this state. Unemployment is therefore a subject of general interest and concern which requires appropriate action by the Legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life. This can be provided by encouraging employers to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance. The Legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, for the compulsory setting aside of unemployment reserves to be used for the benefit of unemployed persons."

Accordingly, I respectfully dissent. The result reached by the trial judge is correct.

APPENDIX G

April 24, 1975

SUPREME COURT OF LOUISIANA

NATIONAL GYPSUM COMPANY,
Plaintiff-Appellant-Respondent

versus No. 55,516

ADMINISTRATOR, LOUISIANA DEPARTMENT OF EMPLOYMENT SECURITY, *et al.*,
Defendants-Appellees-Relators

Writ of Certiorari, or Review, to the Court of Appeal, Fourth Circuit, Orleans Parish.

* * *

TATE, Justice.

The employer ("Gypsum") seeks judicial review of an administrative determination that its employees were entitled to unemployment compensation benefits under the Louisiana Employment Security Law, La.R.S. 23:1471 et seq. The trial court affirmed the administrative determination, but a majority of the court of appeal reversed, over strong dissent. 300 So.2d 527 (La.App. 4th Cir. 1974), certiorari granted 303 So.2d 175 (La. 1974).

The court of appeal upheld Gypsum's contentions that its employees were disqualified from receiving

unemployment compensation on the ground that their unemployment was "due to a labor dispute which is in active progress" at the employment premises. La.R.S. 23:1601(4).[1]

The context facts are undisputed:

The claimants are members of a labor union local. The existing contract expired on February 1st. Negotiations had been and were in progress for a new contract. The employes continued to report to work each day after the contract expired.

At a negotiating session on February 3rd, the employer informed the union negotiators that the employees would be locked out if they did not by February 5th sign the contract offered by the employer. When the employees reported for work on February 5th, they found the gate locked and no work available.

---

1 La.R.S.23:1601 provides: "An individual shall be disqualified for benefits:

"(1) If . . . he has left his employment without good cause connected with his employment. * * *

"(2) If . . . he has been discharged for misconduct connected with his employment. * * *

"(3) If . . . he has failed, without good cause, either to apply for . . . or to accept suitable work * * *.

"(4) For any week with respect to which the administrator finds that his unemployment is due to a labor dispute which is in active progress at the factory, establishment, or other premises at which he is or was last employed; but such disqualification shall not apply if it is shown to the satisfaction of the administrator that he is not participating in or interested in the labor dispute which caused his unemployment. For the purposes of this Sub-section, if separate branches of work which are commonly conducted as separate businesses in separate premises, are conducted in separate departments of the same premises, each such department shall be deemed to be a separate factory, establishment or other premises.

"* * *".

They reported to work each day thereafter during the lock-out, but no work was available for them because the plant gates were locked.

During the collective bargaining sessions, the union had informed the management that the employees would continue to work without a contract and would not strike, even if a strike was thereafter called, until after management had sufficient notice to assure the orderly closure of the plant. In fact, no strike was authorized by the Union until March 4th.[2]

A majority of the court of appeal held that, under these facts, the employer Gypsum had locked out its employees in the course of a labor dispute. It held that the unemployment was thus due to a labor dispute, within the disqualifying provisions of La.R.S. 23:1601(4) (see footnote 1 above).

We are unable to agree with the court of appeal. In the light of the statutory purposes and in the context of the other disqualifying provisions, unemployment due to a lock-out by the employer is not, within the legislative intention, caused by "a labor dispute which is *in active progress*" at the premises. La.R.S. 23:1601(4).

In enacting the unemployment compensation statute, the legislature solemnly declared that, "as a guide to the interpretation and application" of its statutory

2 The claimants do not contend that they are entitled to compensation benefits after they went on strike, since they voluntarily entered into an active labor dispute at that time.

provisions, "the public policy of this state is declared to be as follows: Economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of this state. Unemployment is therefore a subject of general interest and concern which requires appropriate action by the Legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life." Thus, unemployment compensation is not paid primarily to reward the employee nor to punish the employer, but rather to protect the stability of the state and of the family, by relieving the family distress and the menace to the public welfare occasioned through unemployment of individual workers.

However, the legislature also provided for the disqualification from such benefits for employees who left employment or refused to accept it without good cause or who had been discharged for misconduct. La.R.S. 23:1601 (1), (2), (2) (see footnote 1 above). It additionally provided that employees could not receive benefits for unemployment "due to a labor dispute which is in active progress" on the premises.

In view of the strong public policy of the act designed to avoid crushing hardship on unemployed workers and their families, we think the more reasonable interpretation of the disqualification to be that unemployment due to "a labor dispute in active progress" includes only unemployment resulting from labor disputes in which the employee himself ac-

tively engages by refusing to work. We are reinforced in this interpretation by the further provision of the labor-dispute disqualification to the effect that an employee of a separate department shall not be deemed disqualified if he is unemployed because of a labor dispute within another department of the same premises.[3]

In our opinion, the administrative board therefore correctly explained the purpose of the labor-dispute disqualification and why it is not applicable to the present claimants, here unable to work through no fault of their own: "The Unemployment Compensation Act is not intended to encourage idleness or labor disputes nor to force an employer to contribute benefits to help finance his employees' disputes with him. Only an employee prevented from working through no act of his own should be entitled to unemployment benefits."

We thus regard the disqualification provision of La.R.S. 23:1601(4) as an expression of the public policy that the State remain neutral in labor disputes. The award or denial of unemployment compensation should not be available as a weapon to either labor or management, as they seek to resolve their differences.

When employees are on strike, we have held that, by reason of the statutory policy, they cannot receive unemployment benefits. Senegal v. Lake Charles Stevedores, Inc., 250 La. 623, 197 So.2d 648 (1967). We hold to-

3 See second sentence of La.R.S.23:1601(4), quoted in footnote 1 above.

day that, for similar reasons, the act was not intended to enforce a lock-out by the employer by denying unemployment benefits to employees who are available for work, but who are denied it by their employer. To deny compensation under such circumstances would not only be to deny benefits to employees unemployed through no fault of their own, but would be to add a sanction not contemplated by law to conduct by the employer designed to withhold subsistence from his workers and their families in order to force them to accept the employer's terms.

We thus do not believe that a labor dispute is in active progress, insofar as disqualification for unemployment benefits is concerned, when the employees are exercising their legal right through peaceful negotiation to bargain for what they deem to be better working conditions.

To hold that, by resort to the economic coercion of a lock-out instead of to the bargaining table, an employer might also obtain his employees' disqualification from unemployment benefits to help feed themselves and their families, would be to encourage the resort to measures more aggressive than peaceful negotiation. The correct interpretation of the unemployment compensation act, in the light of its express policies and in the light of the general public policy in favor of peaceful bargaining negotiation should not permit either party to provoke the award or denial of unemployment benefits in order to enforce the effect of a strike or of a lock-out.

We are aware that ours is a minority position among American jurisdictions; however, we are also aware that, in a number of instances where courts did not so interpret their unemployment statutes, such judicial interpretations were legislatively overruled in order to conform to the fundamental purpose and legislative intent of the unemployment compensation act. Broden, Law of Social Security and Unemployment Insurance, Section 9.03 (1962); Lewis, The Law of Unemployment Compensation in Labor Disputes, 13 Labor L.J. 174 (1962).

The only decision of this court interpreting the labor-dispute disqualification is *Senegal*, cited above.[4] It is not inconsistent with the result we here reach; we there held that a purpose of the labor-dispute disqualification was not to subsidize a strike.

Similarly, our interpretation today prevents the disqualification from being used as a weapon to enforce a lock-out. The State should be neutral in labor disputes, and it should not encourage resort to aggressive measures in derogation of peaceful negotiation at the bargaining tables.

For the reasons assigned, we reverse and set aside the court of appeal decree, and we reinstate the trial

4 Several court of appeal opinions have held that employees out of work because of a strike are not entitled to unemployment benefits. Handyman Homes, Inc. v. Administrator, etc., 192 So.2d 827 (La.App. 1st Cir. 1966); Brown v. Brown, 158 So.2d 305 (La.App. 1st Cir. 1963). They concern distinguishable facts. No rehearing or review was sought of the decision in Singleton v. Brown, 153 So.2d 902 (La.App. 1st Cir. 1963), which reaches a result inconsistent with our decision today.

court judgment affirming the administrative determination that the employees are entitled to unemployment compensation benefits.

COURT OF APPEAL OPINION SET ASIDE; TRIAL COURT JUDGMENT REINSTATED.

SANDERS, C.J., dissents and will assign written reasons.
SUMMERS, J., dissents and will assign reasons.
PARKS, A., dissents for reasons assigned by Justice Sanders.

May 2, 1975

SUPREME COURT OF LOUISIANA

NATIONAL GYPSUM COMPANY

versus No. 55,516

ADMINISTRATOR, LOUISIANA DEPARTMENT OF EMPLOYMENT SECURITY, ET AL

SANDERS, Chief Justice (dissenting).

At issue here is the right of a group of employees to receive unemployment compensation benefits.[1] The Court of Appeal held that the employees were dis-

1 The present suit involves a single claimant, but the parties have agreed that the disposition of it will control the claims of the other employees.

qualified from receiving benefits under LSA-R.S. 23:1601(4),[2] because the unemployment was due to a labor dispute. La. App., 300 So.2d 527 (1974). I agree.

Under the disqualification provision, we are obliged to determine whether or not a labor dispute was in progress and, if so, whether or not the claimants were "participating in or interested in" the dispute. See Senegal v. Lake Charles Stevedores, Inc., 250 La. 623, 197 So.2d 648 (1967).

I find the following narration of facts by the Court of Appeal to be correct:

> "The record shows that the claimant is a member of the local union which had entered into a contract with the employer. The contract was due to expire at 7:00 A.M. on February 1, 1973. For more than a month prior to that date, the union and the employer had held collective bargaining meetings for the purpose of negotiating a new contract. At a union meeting in January, 1973, the union members voted to give authority to their negotiating committee to call a strike if negotiations failed and no contract agreement was reached, if it considered a strike necessary after the expiration date of the old contract, and provided the

2 (4) For any week with respect to which the administrator finds that his unemployment is due to a labor dispute which is in active progress at the factory, establishment, or other premises at which he is or was last employed; but such disqualification shall not apply if it is shown to the satisfaction of the administrator that he is not participating in or interested in the labor dispute which caused his unemployment.

> International Union granted authority. Although the request for authority was made in January, it was not granted until March 4, 1973, after a second request on that date.
>
> "The day before the expiration of the contract, January 31, 1973, the union and the employer held another bargaining session at which each made a final offer and each in turn was rejected. The next day, February 1, 1973, the union workers reported for work on the morning shift which started at 7:00 A.M., coincident with the expiration of the contract, but found the gate locked. This was because management had instructed the security guard at the gate to close the gate if it appeared some trouble may develop. None did, and after consultation between the union and employer representatives, it was agreed that the plant would reopen for the next shift and another bargaining session would be held.
>
> "This session was held on February 3, 1973, and no agreement was reached. At this meeting the employer declared that if a contract was not agreed upon by the 3:00 P.M. shift of February 5, 1973, the company would lock the gates and refuse to let the union employees work until there was a contract agreement. The union announced that it would not agree not to strike, but assured the company that it was a responsible union and would give ample notice of a strike, providing the workers necessary to properly close down the plant

operations. No agreement was reached by the deadline given, and the company closed the plant to union employees in accordance with its threat, keeping the plant in limited operation by its supervisory personnel."

On the above facts, I conclude that there was a labor dispute in active progress; that the lockout resulted from a negotiation impasse; and that the employees, as members of the negotiating union, had an interest in the dispute.

Despite these clearly established facts, the majority holds that no disqualification arose here, since the lockout was imposed by the unilateral action of management.

I do not construe the disqualification provision so narrowly. LSA-R.S. 23:1601(4) is an expression of public policy that the State remain neutral in labor disputes. The public fisc should be unavailable to either labor or management as they seek to resolve their differences. We have heretofore applied this statutory policy in denying benefits to employees on strike. Senegal v. Lake Charles Stevedores, Inc., supra.

A lockout is the closure of a plant or establishment by the employer as an economic weapon during a labor dispute. It is the counterpart of a strike. Federal labor law recognizes a lockout as a legitimate measure to support the employer's bargaining position. American Ship Building Co., v. N.L.R.B., 380 U.S. 300, 85 S.Ct. 955, 13 L.Ed.2d 855 (1965); Adkins v. Indiana Employment Security Division, 70 N.E.2d 31

(Ind. App. 1946). To subsidize the employees through unemployment compensation during a lockout would undermine the economic measure, which the law itself shelters. See LSA-R.S. 23:1531-1571.

As the Court of Appeal noted, we are confronted here with an important state policy, that of maintaining state neutrality in labor disputes. By its decision, the majority has done violence to that policy. See Johns-Manville Corp. v. Doyal, ___ F.2d ___ (5th Cir. 1975).

For the reasons assigned, I respectfully dissent.

APPENDIX H

SUPREME COURT OF LOUISIANA
NEW ORLEANS, 70112

FOR IMMEDIATE NEWS RELEASE

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the 30th day of May, 1975, the following action was taken by the Supreme Court of Louisiana in the cases listed below:

* * * *

REHEARINGS REFUSED:

* * * *

55,516 National Gypsum v. Adm. La. Dept. of Emp. Security SANDERS, C.J., SUMMERS & BARHAM, J.J., are of the opinion that a rehearing should be granted.

* * * *

APPENDIX I

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NATIONAL GYPSUM COMPANY,
Plaintiff

versus No. 558-174

ADMINISTRATOR, LOUISIANA DEPARTMENT OF EMPLOYMENT SECURITY, ET AL.
Defendant

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that National Gypsum Company, the Plaintiff above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of Louisiana in favor

of Defendant entered in this action on May 30, 1975. This appeal is taken pursuant to 28 U.S.C. §1257(2).

/s/ SAMUEL LANG
SAMUEL LANG

/s/ WALTER W. CHRISTY
WALTER W. CHRISTY

/s/ WILLIAM C. TIDWELL, III
WILLIAM C. TIDWELL, III
Kullman, Lang, Inman & Bee
A Professional Corporation
Post Office Box 60118
New Orleans, Louisiana 70160
(504) 524-4162

COUNSEL FOR
NATIONAL GYPSUM
COMPANY

CERTIFICATE

I, Samuel Lang, one of the attorneys for National Gypsum Company, Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 5th day of August, 1975, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States, certified mail, return receipt requested, first class postage prepaid, on the several parties thereto, as follows:

1. Administrator
Louisiana Department of
Employment of Security

Through its counsel of record, Marion Weimer
Attorney at Law
Louisiana Department of
Employment Security
P.O. Box 44094
Baton Rouge, Louisiana 70804

2. Oil, Chemical & Atomic Workers Local Union No. 4-447,
Intervenor, Through its counsel of record,
Leonard A. Washofsky
Jackson & Hess
1411 Decatur Street
New Orleans, Louisiana 70116

3. Louisiana AFL-CIO
Amicus Curiae in the Supreme Court of Louisiana, through its counsel of record,
C. Paul Barker
Dodd, Barker, Boudreaux, Lamy & Gardner
1400 Richards Building
837 Gravier St.
New Orleans, Louisiana 70112

It is further certified that all parties required to be served have been served.

/s/ SAMUEL LANG
SAMUEL LANG

Supreme Court, U. S.
FILED
NOV 18 1975
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-299

NATIONAL GYPSUM COMPANY,
Appellant,

v.

ADMINISTRATOR, LOUISIANA DEPARTMENT OF EMPLOYMENT SECURITY, ET AL.
Appellees.

Appeal from the Supreme Court of Louisiana

Motion to Dismiss on behalf of the Administrator of the Department of Employment Security of the State of Louisiana, Oil Chemical & Atomic Workers Local Union No. 4-447, and Louisiana AFL-CIO, Appellees,

Marion Weimer, James A. Piper
and James A. McGraw
Attorneys for Administrator
Post Office Box 44094, Capitol Station
Baton Rouge, Louisiana 70804

Jackson & Hess, Leonard Washofsky
Attorneys for Oil & Atomic Workers
Local Union No. 4-447
1411 Decatur Street
New Orleans, Louisiana 70116

Dodd, Barker, Boudreaux, Lamy & Gardner
C. Paul Barker
Attorneys for the Louisiana AFL-CIO
1400 Richards Building
837 Gravier Street
New Orieans, Louisiana 70112

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In the
Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-299

NATIONAL GYPSUM COMPANY,

Appellant,

v.

ADMINISTRATOR, LOUISIANA DEPARTMENT OF EMPLOYMENT SECURITY, ET AL.

Appellees.

Appeal from the Supreme Court of Louisiana

The Appellees move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Louisiana on the grounds that this Honorable Court lacks jurisdiction to entertain the appeal for reasons that a substantial Federal question was not timely raised in the state court; and, for the further reason that the proceedings in the state court does not present a substantial federal question.

Appellant's description of the proceedings below is misleading insofar as it seeks to convey the impression that the question presented was raised at any time prior to Appellant's Petition for Rehearing in the Supreme Court of Louisiana, *see infra*.

I. THE FEDERAL QUESTION WAS UNTIMELY RAISED IN THE STATE COURTS.

Appellant states that the federal question presented by its appeal was raised on petition for rehearing in

the Supreme Court of Louisiana. (JS 5-6; see also JS 2, last sentence.) This was too late. As the leading commentators on practice in this Court have put it:

> Raising the federal question for the first time in a petition for rehearing addressed to the highest state court is generally insufficient unless the court actually entertains the petition and expressly decides the question. *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 128; *Hanson* v. *Denckla*, 357 U.S. 235, 243-4; *Herndon* v. *Georgia*, 295 U.S. 441, 443; *American Surety Co.* v. *Baldwin*, 287 U.S. 156; *Forbes* v. *State Council*, 216 U.S. 396; *Simmerman* v. *Nebraska*, 116 U.S. 54. To constitute a reviewable judgment under such circumstances, the order denying the petition for rehearing must be more than a cursory recitation that the petition has been fully or maturely considered and accordingly is denied. *Consolidated Turnpike Co.* v. *Norfolk & O. V. R. Co.*, 228 U.S. 326, 333-4; *Forbes* v. *State Council, supra*, 399; *McCorquodale* v. *Texas*, 211 U.S. 432, 436-7. There must be language indicating that the federal question was considered and disposed of. In other words, the court must exert its jurisdiction "in such a way that the case could have been brought here had the questions been raised prior to the original disposition." *Radio Station WOW* v. *Johnson, supra*, 128 [1].

In this case the ruling of the Supreme Court of

[1] R. Stern and E. Gressman, *Supreme Court Practice*, fourth ed., 1969, p. 124. The quoted passage also makes clear the futility of appellant's speculation that the denying of the petition for rehearing by the Louisiana Supreme Court "implicitly upheld the validity of the state law." (JS 3).

Louisiana on the petition for rehearing, in its entirety, was "Rehearings Refused".

There is, to be sure, a single narrow exception to the foregoing rule:

> Thus if the question is created by an unexpected decision of the highest state court, giving the litigant no prior opportunity to anticipate or assert the particular federal question, the petition for rehearing constitutes his first and probably his only change to present the matter to that court. Accordingly the federal question is timely raised and will support the exercise of Supreme Court jurisdiction. This is true even though the petition for rehearing is summarily denied without reference to the federal question . . . the litigant must be able to show that the decision of the state court was a surprise and could not have been reasonably anticipated from prior decisions. *Herndon* v. *Georgia*, 295 U.S. 441.

Appellant does not expressly assert that this case comes within this exception, for it does not acknowledge the existence of a jurisdictional problem. However, the following passage appears to insinuate that the Herndon exception applies:

> Following this decision [of the Louisiana Supreme Court], which for the first time authoritatively construed La. R.S. 23:160 (4), the Employer applied for rehearing on the ground, inter alia, that the state law, as interpreted by the state supreme court, was preempted by federal labor policy. (JS 6)

It is of course not enough to excuse the failure to raise the federal question prior to a petition for re-

hearing that the highest court of the state has decided a case of first impression under state law in a manner adverse to the appellant. It is required that "the federal claim was timely if the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it." (*Herndon supra*, 295 U.S. at 444.) Here the possibility that the state supreme court would construe the state unemployment compensation statute to allow benefits to locked out employees, could and should have been anticipated since that is the construction which the Department of Employment Security had placed on it, and had defended in the state courts. Nor was there any reason why appellant, in challenging the Department's eligibility ruling, could not at an earlier stage as it eventually did on petition for rehearing have asserted as a separate ground that if the state statute were so construed it would conflict with federal law.

Of course, counsel's disappointment in the disposition of state law issues, or even a reasonable belief that those issues would be decided a certain way, does not mean that the opposite result could not have been "anticipated" in the sense of cases such as *Herndon*, supra. What is required is a completely unexpected reversal of the posture of the litigation, as in the celebrated case of *Brinkeroff-Faris Trust and Savings Co.* v. *Hill*, 281 U.S. 673, where the ruling which created the federal question "was not suggested by anyone in the entire litigation until the supreme court filed its opinion".

Additionally, appellant apparently seeks to convey the impression that it asserted its federal claim prior to the petition for rehearing in the Supreme Court:

> The validity of the Employer's lockout under federal labor law and the *American Ship Building Co.* v. *NLRB* 380 U.S. 300 decision was argued in the brief and in oral argument to the Civil District Court for the Parish of Orleans, the Louisiana Fourth Circuit Court of Appeal, and the Louisiana Supreme Court. The dissenting opinion of the Louisiana Supreme Court agreed with the Employer's argument. (Jurisdictional Statement 6) [2]

The foregoing is obviously insufficient to comply with the requirements of this Court's rule 15 (1) (d) that the statement of the case shall contain

> such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter [which raised the questions] appears . . . as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction this court.

Moreover, the record affirmatively shows that, as late as its brief on the merits in the state supreme court, appellant, in the course of the argument in which it invoked "federal labor law and the American Ship

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[2] See also Jurisdictional Statement 2: "The Employer argued in the state court that its lockout was protected by federal labor law."

Building decision" said regarding the power of the states to grant unemployment benefits to locked out employees: (Jurisdictional Statement 6)

> While *a state is free to choose to pay unemployment compensation to locked-out employees, or even to strikers, by appropriate legislation*, once the state chooses to make participants in a "labor dispute" ineligible for benefits, the state may not then adopt a definition of a labor dispute that conflicts with federal labor policy.[3]

As appears from the foregoing sentence, and the entire passage which is reprinted as an appendix hereto (pp. 23-27 infra), appellant's reliance on federal law was solely for the proposition that if eligibility is made to turn on the existence of a labor dispute, the state may not distinguish between strikers and employees who have been locked out. Thus, far from giving the Supreme Court of Louisiana the opportunity to decide the federal question which the company now presents on its appeal, the company's brief to that court denied the existence of that question.[4]

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[3] Original Brief on Behalf of National Gypsum Company, Plaintiff-Appellee, on the Merits, p. 7, emphasis added.

[4] Appellant's reliance on one of the dissenting opinions in the Supreme Court of Louisiana (JS 6) is misplaced for two reasons.

First, even if the dissenting opinion clearly established that one or more members of the minority in the state supreme court would have decided the federal question in appellant's favor, this would not suffice; for jurisdictional purposes it is necessary that the question be timely presented to or decided by the majority. Compare *Charleston* Federal Savings & L. Ass'n. v. Alderson, 324 U.S. 182, 186, n. 1 and cases there cited holding that even a certificate of the presiding justice of the highest court does not suffice to establish that the federal question was properly raised in that court.

Second, appellant's quotation of the dissenting opinion (JS 61a quoted at JS 9, which in turn is referred to at JS 6, note 4) is misleading. When the citations which appellant omits are restored, one finds that "the law" which in the dissenting judge's view "shelters" the lockout (JS 61a) is not *federal* law but "LSA-R.S. 23:1531-1571." (Id.) This reading is further confirmed by the remainder of the dissenters' opinion: "As the Court of Appeal noted, we are confronted here with an important *state policy*, that of maintaining state neutrality in labor disputes. By its decision, the majority has done violence to that policy. See *Johns-Manville Corp.* v. *Doyal*, ____F.2d ____(5th Cir. 1975)." (Id. emphasis added.)

[5] We note, however, that appellant exaggerates when it says "the state replaces the missing wages," for the benefits are substantially less than is earned in a normal work-week.

It is clear from the foregoing that appellant did not raise the federal question in a timely manner in the state courts, and this Court therefore lacks jurisdiction over this appeal.

II. THE FEDERAL QUESTION IS INSUBSTANTIAL.

A. Introduction—The Touchstone is Congress Purpose.

In appellant's view, the issue involves a simple syllogism; 1) the lockout is an economic weapon which federal law contemplates an employer may utilize in order to achieve its goals in collective bargaining; 2) the payment of unemployment compensation benefits by States substantially reduces the effectiveness of the lockout; *ergo*, this is a form of interference with federal policy forbidden by the Supremacy Clause. We readily accept the first of appellant's premises, and for present purposes the second as well.[5]

Our disagreement is with the conclusion which appellant would draw from these premises.

For while the precedents which appellant cites establish that state policies must often yield to the federal policy favoring the free play of economic forces, this court has also cautioned that these cases do not establish an absolute rule forbidding any form of state activity which will adversely affect the exercise of federally sanctioned economic weapons. As the Court explained in *Retail Clerks* v. *Schermerhorn*, 375 U.S. 96, 103:

> "San Diego Building Trades Council vs. Garmon [359 U.S. 236] however, does not state a constitutional principle; it merely rationalizes the problems of coexistence between federal and state regulatory schemes in the field of labor relations.
>
> "The purpose of Congress is the ultimate touchstone. Congress under the Commerce Clause may displace state power (Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 234-236; San Diego Bldg., Trades Council v. Garmon, supra) or it may even by silence indicate a purpose to let state regulation be imposed on the federal regime. See Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 141-143. (375 U.S. at 103-104).

The fundamental flaw in appellant's argument is that it ignores the most direct evidence of "the purpose of Congress" with respect to the scope of state authority on the precise matter at issue here. That evidence is threefold: 1) in the Social Security Act of 1935 Congress as a matter of deliberate choice pre-

served for the states broad freedom to determine elegibility for unemployment compensation benefits, and did so with the knowledge that the states might choose to grant elegibility to employees involved in labor disputes; 2) in the same year Congress adopted the Social Security Act, and under the sponsorship of the same senator, Mr. Wagner, Congress also enacted the original National Labor Relations Act; and 3) when Congress amended the National Labor Relations Act in 1947 it deliberately rejected a proposal which was designed to render strikers ineligible for unemployment compensation benefits.

B. The Basic Unemployment Compensation Law Authorizes the States to make their own Determinations as to whether Strikers Shall be granted Benefits

From the very beginning of the federal unemployment compensation program the States have been free to determine whether and under what conditions strikers are to be eligible for benefits. Under the scheme of Titles III and IX of the Social Security Act of 1935,[6] States obtained federal funds for the administration of unemployment compensation programs if they adopted unemployment compensation laws which were approved by the Social Security Board.

Section 903 of the Act required the Social Security Board to approve any State law which satisfied

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[6] 49 Stat. 620; these are presently codified as 26 USC §3301 *et. seq.*, 42 USC §501 *et. seq.*, and 42 USC §1101 *et. seq.*

certain conditions; the only conditions dealing with eligibility for benefits were set forth in §903(a)(5).[7] In all other respects the States were to be free to create their own eligibility standards.

The broad leeway thus given the States was a matter of conscious choice by Congress. As was stated in the Report of the Senate Finance Committee:

> "Except for a few standards which are necessary to render certain that the State unemployment compensation laws are genuine unemployment compensation acts and not merely relief measures, the States are left free to set up any unemployment compensation system they wish, without dictation from Washington." Senate Report No. 628, 74th Cong., 1st Session, pp.

Thus in sustaining the constitutionality of the program against the charge that it "call[s] for a surrender by the states of powers essential to their quasi-sovereign existence" by §903, Mr. Justice Cardozo relied on its limited scope and observed: "A wide range of judgment is given to the several states as to the particular type of statute to be spread upon their books." *Steward Machine Co. v. Davis*, 301 U.S. 548, 593.

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[7] "(5.) Compensation shall not be denied in such State to any otherwise eligible individual for refusing to accept new work under any of the following conditions: (A) If the position offered is vacant due directly to a strike, lockout, or other labor dispute; (B) if the wages, hours, or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality; (C) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization;"

Titles III and IX of the Social Security Act of 1935 have been amended many times. But the provisions with which we are here concerned have remained unchanged. The philosophy embodied in the 1935 Social Security Act still holds sway. As Congressman Mills, the Chairman of the House Ways and Means Committee and the floor manager of the Employment Security Amendments of 1969 stated:

> "We have tried to keep from prohibiting the States from doing the things the States believe are in the best interest of their people. There are a lot of decisions in this whole program which are left to the States.
>
> For example, there are two States, I recall,

Congress knew that the States could exercise the authority reserved by §903 to declare strikers eligible for unemployment compensation benefits. First, New York, one of only five States which had enacted an unemployment compensation law before the federal law was passed, had declared strikers eligible after ten weeks. Congress was fully aware of the New York law. (See e.g., Report of the Senate Finance Committee, *supra*, p. 11). Second, the Committee on Economic Security had considered the problem of the interrelation of unemployment compensation and a system of free collective bargaining with the following twofold result. In the draft bill prepared for the use of State legislatures contemplating entry into the unemployment compensation program, the Committee *suggested* that the States disqualify from eligibility persons whose unemployment is due to a labor dispute. The first of these draft bills was before Congress. (See E. Witte, The Development of the Social Security Act, p. 125 (U. Wis. Press, 1963.) Congress decided to *forbid* States from disqualifying workers who refused to take employment at the scene of a labor dispute embodied in §903(a)(5)(A), thus further showing that it had focused on the labor dispute problem and chose to create a national standard only on one aspect thereof.

which will pay unemployment benefits when employees are on strike, but only two out of 50 make that decision. That is their privilege to do so. They are taxing their employers within the State to pay unemployment benefits. If the legislature wants to do it, why not let them do it? I would not vote for it, and the gentleman would not vote for it, but if the State wants to do it we believe they ought to be given latitude to enable them to write the program they want." 115 Cong. Rec. 34106 (Nov. 13, 1969)

C. It is not inconsistent with The National Labor Policy for a state to provide Unemployment Compensation benefits to striking or locked employees.

1. The Original National Labor Relations Act

The principle that contract terms are to be determined through a system of collective bargaining in which the use of economic weapons by employees through their unions and by employers is sanctioned as an affirmative policy in the National Labor Relations Act in 1935, see, e.g., Porter Co. v. NLRB, 397 U.S. 99, 103-105.

There is nothing in the NLRA which deals expressly with the question of whether that principle forecloses striker eligibility for unemployment compensation benefits. Nevertheless it is clear that Congress did not by adopting the National Labor Relations Act intend to reverse its decision in the Social Security Act to allow self-determination by the states on this subject. For if ever two statutes are to be read as *in pari materia*, it is the Social Security Act of 1935 and

the National Labor Relations Act of 1935. Not only were these statutes passed in the same year as major elements of the New Deal program, Senator Wagner, the prime mover of the National Relations Act, was also a sponsor of the Social Security Act, see 79 *Cong. Rec.* 9283. The bills moved through Congress at the same time, with the National Labor Relations Act being enacted on July 5, 1935, and the Social Security Act becoming law on August 14, 1935.[8]

2. The 1947 Amendments to the National Labor Relations Act

So matters stood when in 1947 the 80th Congress addressed itself to revising the Wagner Act. The wisdom of permitting strikers to draw unemployment compensation was then, as it is now, a controversial issue.

The House of Representatives determined to put an end to the practice by declaring that strikers who

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[8] Wagner Act:
Senate Debate May 14-16, 1935
House Debate June 19, 1935
Conference Report agreed to by House and Senate June 27, 1935
Presidential Signature July 5, 1935
Social Security Act:
House Debate April 11-19, 1935
Senate Debate June 14, 15, 17-19, 1935
Conference Report agreed to by the House August 8, 1935
Conference Report agreed to by the Senate August 9, 1935
Presidential Signature August 14, 1935

accepted unemployment compensation benefits would thereby forfeit their status as employees and lose the statutory right to reinstatement which flows therefrom. (Cf. *Labor Board* v. *Mackay Radio Corp.*, 304 U.S. 333.) This was to be accomplished by amending the statutory definition of employee to exclude any person "receiving unemployment compensation from any state." [9] The House Committee on Education and Labor explained the purpose of this provision:

> A few States pay strikers after the fifth, sixth, or seventh week of a strike. This clearly is a perversion of the purposes of the social-security laws, which Congress intended to provide for unemployment compensation for those out of work involuntarily and through no fault of their own. We therefore have provided that a striker's status as an 'employee' stops when he starts receiving unemployment compensation from any State. He may receive relief from his union, from local welfare funds, or from charity without losing that status.[10]

The Senate, however, did not adopt this proposal, opting instead to "follow the provision of the existing law with three exceptions", none of which touched the right of strikers.[11] The Senate's view prevailed on

[9] H.R. 3020, 80th Cong., as reported out, p. 4, and as it passed the House, p. 4, reprinted in I Legislative History of the Labor Management Relations Act of 1947 (hereafter "1947 Leg. Hist."), pp. 34, 161.

[10] H. Rep. No. 245, 80th Cong., 1st Sess., pp. 12-13, 1947 Leg. Hist., 303-304.

[11] H. Conf. Rep. No. 510, 80th Cong., 2d Sess., p. 33, 1947 Leg. Hist., p. 537.

this issue, although the House version of the definition of "employee" was adopted in other respects.

Since Congress thus focused on the specific question whether the receipt by strikers of unemployment compensation is inconsistent with the national labor policy, this legislative history is a decisive demonstration of Congressional intent and understanding which refutes the appellant's purely theoretical arguments from the national labor policy.

In sum, in dealing with the extent to which unemployment compensation benefits would be available in the strike context, as in dealing with the extent to which union security agreements would be lawful, Congress has chosen "to abandon any search for uniformity ***and decided to suffer a medley of attitudes and philosophies on the subject," (*Schermerhorn*, *supra*, 375 U.S. at 104-105). Thus, a state decision to utilize the authority reserved to it by federal law to pay such benefits (so long as the conditions set out in §903 are observed), no more raises a Supremacy Clause question than a state decision to adopt a so-called "right-to-work" law (within the confines noted in *Schermerhorn*, *id.* at 105). In each instance, while it is the state that acts, it is Congress that has set the policy permitting that action.

CONCLUSION

For the above stated reasons, this appeal should be dismissed.

Wherefore, Appellees respectfully submit that the

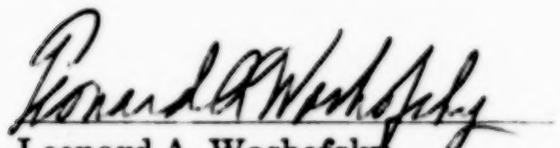
questions upon which this cause depends are to unsubstantial as not to need further argument, and Appellees respectfully move the Court to dismiss the Appeal, or, in the alternative, to affirm the decision of the Louisiana Supreme Court.

Respectfully Submitted,

Marion Weimer, James A. Piper
James A. McGraw,
Post Office Box 44094
Capitol Station
Baton Rouge, Louisiana 70804

Jackson & Hess
Leonard Washofsky
of Council Attorneys for
Oil, Chemical & Atomic Workers
Local Union No. 4-447

Dodd, Barker, Boudreaux,
Lamy & Gardner,
C. Paul Baker of Council
Attorneys for Louisiana
AFL-CIO



Leonard A. Washofsky
Attorney

APPENDIX

Excerpts from Appellants brief to Louisiana Supreme Court.

The Public Policy Governing Cases Arising Under La. R.S. 23:1601(4).

An important public policy of providing relief from economic duress to the unemployed is the basis of many provisions of the Unemployment Compensation Act. However, the Court of Appeals recognized that an equally important public policy of State neutrality in labor disputes underlies subsection 1601(4). *National Gypsum Company v. Administrator, supra* at 534.

Indicative of this policy are cases holding that a claimant unemployed due to a labor dispute must affirmatively prove his eligibility for benefits. The burden is on the claimant to prove lack of participation or interest in that labor dispute. *Senegal v. Lake Charles Stevedores, supra*; *Hanndyman Homes, Inc. v. Administrator,* 192 So. 2d 827 (1st Cir. 1966); *Brown v. Brown, supra.* The legislature created a clear distinction between subsection 1601(4) and the other disqualifying provisions. For all other subsections the *company* must prove the claimant ineligible; only in subsection 1601(4) must the *claimant* bear this burden. Furthermore, the Louisiana Supreme Court has held that the legislature intended subsection 1601(4) to be a broad disqualification. *Senegal v. Lake Charles Stevedores, supra* at 651. The Court of Appeals correctly ruled that section 1601(4) should be applied in

accordance with this public policy of state neutrality in labor disputes. *National Gypsum Company v. Administrator, supra* at 534.

Claimants' Unemployment Is Due To An Active Labor Dispute

Louisiana law on unemployment compensation provides, in pertinent part:

> "An individual shall be disqualified for benefits:
> . . . (4) For any week with respect to which the administrator finds that his unemployment is due to a labor dispute which is in active progress at the factory, establishment, or other premises at which he is or was last employed; but such disqualification shall not apply if it is shown to the satisfaction of the administrator that he is not participating in or interested in the labor dispute which causes his unemployment. . . .

La. R.S. 23:1601(4).

The initial question under section 1601(4) is whether the unemployment of the claimants was "due to a labor dispute." The Company submits that a lockout occurring during collective bargaining and brought to protect the Employer's bargaining position constitutes a labor dispute within the meaning of the statute. The immediately preceding subsection of this statute provides that to be eligible for compensation a claimant need not accept a position vacant due to a "strike, lockout, or *other* labor dispute." La. R.S. 23:1601(3)(b) (emphasis added). Clearly, this statutory language contemplates that the term "labor dispute" includes lockouts as well as strikes.

Although not specifically made applicable to unemployment compensation cases, Chapter 8 of Title 23 (Labor and Workmen's Compensation) of the Louisiana Revised Statutes provides this definition of labor dispute:

> "The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, or concerning employment or concerning employment relations, or any other controversy arising out of the respective interest of employer and employee, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

La. R.S. 23:821(3). The Court of Appeals correctly found that this definition was persuasive evidence that the statutory term "labor dispute" in section 1601(4) included a lockout called after the breakdown of collective bargaining negotiations. *National Gypsum Company v. Administrater, supra* at 534.

Federal labor law recognizes that the lockout used by an employer is an economic weapon equivalent to the strike called by a union. *See American Ship Building Co. v. N.L.R.B.*, 380 U.S. 300, 85 Sup. Ct. 955, 13 L. Ed. 2d 855 (1965). Each evolves out of the same circumstances, the failure of the parties during collective bargaining to reach an agreement, and each represent an attempt by one party to bring economic pressure to bear on the other to support its bargaining position. Just as the employer may agree to union de-

mands or face a strike, the union may agree to the employer's position or face a lockout. In both the strike and the lockout, wages and terms and conditions of employment are inextricably tied to the resolution of the competing positions of employer and union.

State law also recognizes the equivalency of the strike and the lockout. In *Adkins v. Indiana Employment Security Division*, 70 N.E. 2d 131 (Ind. App. Ct. 1946), the court, in holding that locked-out employees were not eligible for benefits, stated:

> Viewed in its social and economic aspects, the lockout is a weapon in the hands of the employers which is a counterpart to the weapon of strike held by the workers.

Id. at 34, *citing*, *In re North River Logging Co.*, 15 Wash. 2d 204, 130 P. 2d 64, 65 (1942).

Clearly, a definition of labor dispute including strikes must include its counterpart the lockout. Moreover, the federal preemption doctrine, which requires state deferral to federal labor policies, mandates this interpretation. *See Marine Engineers Beneficial Association v. Interlake Steamship Co.*, 370 U.S. 173, 8 L. Ed. 2d 418, 82 S. Ct. 1237 (1962); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 3 L. Ed. 2d 775, 70 S. Ct. 773 (1959). [While *a state is free to choose to pay unemployment compensation to locked-out employees, or even to strikers, by appropriate legislation*, once the state chooses to make participants in a "labor dispute" ineligible for benefits, the state may not then adopt a definition of a labor dispute that conflicts with federal labor policy.] The facts of these

cases clearly constitute a labor dispute under federal law.[12] Since federal labor law recognizes the legitimacy of the Company's lockout [13] the lockout by the Company must be considered a labor dispute.

The Appellants have raised obscure arguments that it was "really" the lockout that caused the claimants' unemployment, not a labor dispute, any labor dispute was "passive" rather than "active", and the lockout was "isolated" from the dispute over a new contract. They raise the spectre of indiscriminate unemployment resulting from employers denying work under the pretex of a lockout. See Brief for Amicus Curiae p. 8. Certainly, when a lockout was not the result of a bona fide dispute, the result might be different. *But that is not the issue here.*

The Appellants raise hypotheticals while ignoring the facts of *this* case.[The Company respectfully submits that the only question before this court is whether *under the facts of this case* the claimants are participating or interested in an active labor dispute that

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[12] National Labor Relations Act, Sec. 2(9), 29 U.S.C. §152 (9) (1970) provides:

> The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

[13] A lockout called after a bargaining impasse to support the employer's bargaining position is permitted by federal law. *American Ship Building Co., supra.*

caused their unemployment.] On the facts of this case, there is only one possible answer.

The contract between the Company and the Union expired on February 1, 1973. For more than a month prior to the expiration date the parties attempted to negotiate a new contract. At a union meeting the union members voted to authorize their bargaining committee to call a strike. A federal mediator was called in to aid in the negotiations. "Final offers" were made, and rejected, by both sides during the meeting of January 31. Further meetings were held at the request of the federal mediator on February 3 and 4, but no agreement was reached. At the meeting on February 3 the Company told the Union that if an agreement was not reached by February 5, the union members would be locked out. Following the meeting of February 4, the talks were broken off with no more bargaining sessions scheduled.

The Company locked out the claimants solely because of the failure to reach an agreement with their union. But for the labor dispute over the terms of a new contract, there would have been no lockout. Tr. 14. Clearly, the cause of the claimants' unemployment was the bona fide labor dispute existing between their union and the Company. This labor dispute was no sham; the lockout was no pretext. The labor dispute was real, and the claimants' unemployment was a direct result. The Court of Appeals stated:

> "These facts convince us that there was a controversy concerning terms and conditions of employment between the union and the employer

> and that it was in active progress at the place of employment. The failure of the parties to settle their dispute and sign a new contract (without regard to who is right or wrong) is the cause of the company locking its doors and preventing the workers from continuing to work. We conclude that this meets the test of disqualification required by the statute."

300 So. 2d at 534.

Claimants Are Interested In Or Participating In The Labor Dispute That Caused Their Unemployment

Since the claimants' unemployment is due to the lockout labor dispute, the burden is on them to prove that they were neither participating in nor interested in that labor dispute.